Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1994

BECKY CHAMBERS, Petitioner,

vs.

AMERICAN TRANS AIR, INC., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUES

1. Whether, in a Title VII action, it is abuse of discretion to grant summary judgment on a motion filed less than 4 months after suit, in the presence of (a) extensive procedural activity during said period, (b) completion by plaintiff of the deposition of her supervisor, (c) pending written discovery by plaintiff aimed at details of to plaintiff's work area, and (d) an 18 page Rule 56 (f) affidavit tendered while a motion for enlargement is pending, documenting severe and widespread discrimination, in both the section of plaintiff and the company as a whole? In this context, how Rule 56 (f) will apply?

2. To what degree of specificity an EEOC promotions claim must by articulated, to preserve it for suit?

3. To what extent a party should be expected to articulate arguments on appeal

under Harris vs. Forklift Systems, Inc, 114 S. Ct. 367 (1993), when not in play in the district court's decision, to preserve a hostile environment claim?

4. To what extent the defendant or lower courts can ignore a plaintiff's articulation of the events in her section in her deposition, in finding no claim for constructive discharge may be pursued?

5. Whether, in cases unlike East Tex. Motor Freight vs. Rodriguez, 431 U.S. 395, the trial court should be required to allow substitution of class representatives?

6. What will be the retroactivity of the 1991 Civil Rights Act, in this case in a Rule 11 context? And should Rule 11 sanctions be available, for seeking punitive or liquidated damages, where plaintiff did not pursue a broad theory unavailable to her, nor did she seek damages unavailable on the facts alleged?

PARTIES

Listed in the caption.

TABLE OF CONTENTS

Table of Authorities	iv
Reference to Reports	vii
Statement of Jurisdiction	viii
Statutes	ix
Statement of the Case	1
Procedural	1
Factual	8
Jurisdiction of the District Court	1
Argument	21
Rule 56 (f) and discovery	21
Failure to Promote	35
Wage Discrimination	38
Workloads and Hostility	39
Constructive Discharge	45
Class Certification	46
Rule 11	49

Appendices

A. 7th Circuit Opinion
(pages 1-33)

B. District Court Entries
(pages 1-147)

May 8, 1991 1

May 23, 1992 32

Oct. 20, 1992 85

Dec. 2, 1992 135

C. 7th Circuit Order Denying Rehearing (pages 1-2)

D. Affidavits
(pages 1-45)

Ed Latimer 1

Gordon B. Dempsey 9

E. March 1, 1989 Motion for Enlargement

TABLE OF AUTHORITIES

CASES

American Nurses Ass'n v. Illinois, 783 F.2d 716 27,33

Assily vs. Tampa General Hospital, M.D. Fla. 1992, 791 F Supp 862 49

Atonio vs. Wards Cove Packing Co., Inc., 10 Fed 3rd 1485 (9th Cir. 1993) 44

Babrocky vs. Jewel Food Co, Retail Meat Cutters Union, 773 Fed. 2d 857, 864 (7th Circuit, 1985) 36-38

Barthel, et al vs. Illinois Central, (Ill. 1978), 384 N.E. 2d 316 47

Berrigan vs. Greyhound, 782 F. 2d 295 (1986) 34

Bohen vs. East Chicago, Indiana, 799 F. 2d 1180 53

Bradley vs. School Bd of City of Richmond, 416 U.S. 669, 715-716 50

Carter vs. AT & T Communications, 759 F. Supp. 155, (S.D.N.Y. 1991) 27,33

Celotex v. Catrett, 477 U.S. 317 22,31,32

Consor vs. Occidental Life, DC Tex 1979, 469 F Supp 1110 47

Cowan vs. J.C. Penney, 790 F. 2d 1529 (11th Cir, 1986) 34

East Texas Motor Freight vs. Rodriguez, 431 U.S. 395 48

Fields vs. Cummins Employees Federal Credit Union, 540 N.E. 2d 631 (Ind. Ct. App. 1989) 51

First National Bank vs. Cities Service Co., 391 U.S. 253 32

Garrett vs. City and County of San Francisco, 818 F.2d 1515 (9th Cir. 1987) 33

Glen Eden Hospital Inc. vs. Blue Cross/Blue Shield of Michigan, Inc., 740 F 2d 423 (1984) 32

Harris vs. Forklift Systems, Inc., 114 S. Ct. 367 (1993) 41-45

Holland vs. Jefferson Nat'l Life Ins. Co., 883 F 2d 1307, 1312 (7th Circuit, 1989) 33

Huddleston vs. Roger Dean Chevrolet, 845 F. 2d 900 (11th Cir, 1988) 53

Hutchison vs. Amateur Electronics Supply, Inc., 840 F. Supp. 612, 619 (E.D. Wis 1993). 50

Jenkins vs. Blue Cross Mutual Hosp. Ins. Co., 538 F. 2d 164, 167 (7th Cir, 1976) 36-38

Kopp vs. Samaritan Health System, Inc., 13 Fed 3rd 264 (8th Cir. 1993) 44

Love vs. Turlington, DC Fla 1984, 733 F 2d 1562 47

Martin vs. D.C. Metropolitan Police Dept., 812 F. 2d 1425, 1436 (D.C. Cir. 1987) 22,26,28

Martin vs. Thompson Co, CA Ala 1973, 486 F 2d 510 47

Matsushita Electric vs. Zenith Radio, 475 U.S. 574 35

Meritor Savings Bank vs. Vinson, 477 U.S. 57 40-45

Mestever vs. Wisconsin Phy-sician, 905 F. 2d 1077 at 1081 (7th Cir 1990) 54

Otto vs. Variable Annuity, 814 F. 2d 1127 (7th Cir 1986) 26

Price Waterhouse vs. Hopkins, 490 U.S. 228 28

Rush vs. McDonald's Corp., (7th Circuit, 1992), 996 F. 2d 1104. 36-38,51

Saxton v. AT & T, 10 Fed 3rd 526. 44

Swanson vs. Elmhurst Chrysler, N.D. Ill, 882 F. 2d 1235 53

Taylor v. Kerr DCNY, 1977, 73 FRD 691 48

Thompson vs. Duke, 940 F. 2d 195 54

Thorpe vs. Housing Authority of City of Durham, 393 U.S. 268 50

U.S. Parole vs. Geraghty, 445 U.S. 388, at 404 (1980) 47

Washington vs. Wayman, DC New York 1971, 54 FRD 266

Young vs. Lane, 922 Fed 2d 370 (1991) 48

OTHER AUTHORITIES

Newberg, Class Actions, Sec. 24.31. 47

Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d, Sec. 2740 (1983) 28, 33

Wright, Miller and Cooper, p. 420, n. 52 48

REPORTS AND OPINIONS

The 7th Circuit opinion was reported at 17 Fed 3rd 998.

GROUNDS FOR JURISDICTION

1. The original district court judgments were May 8 and 28, 1991, with a motion to correct errors denied by order docketed December 4, 1992, and the notice of appeal filed January 5, 1993. The 7th Circuit issued its opinion February 28, 1994. A Petition for Rehearing and a Suggestion for Hearing In Banc were denied May 4, 1994. Defendant filed a Motion to Amend the opinion on May 6, and plaintiff responded. The Motion was granted and a modified opinion issued May 18, 1994.

2. Jurisdiction for certiorari is based on 28 U.S. Code 41 and 1254.

STATUTES INVOLVED

Title VII of the Civil Rights Act, 42 U.S. Code Sec. 2000e-2.

employer practices

(a) It shall be an unlawful employment practice for an employer--

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

STATEMENT OF THE CASE

A. Procedural.

The Complaint, alleging Title VII discrimination based on sex, along with a Petition to Certify as a Class Action and Supporting Brief, was filed October 11, 1988. Jurisdiction was based on 42 U.S. Code Sec. 2000e et seq, Title VII of the Civil Rights Act, and 28 U.S. Code Sec. 1331, providing for jurisdiction over cases involving federal questions.

Plaintiff also filed on October 26, 1988, a Petition to Restrict Solicitation of Exclusions or Individual Settlements, and a Petition for an Order Prohibiting Destruction or Removal of Records. Defendant responded as to exclusions or settlements November 8, 1988, and Plaintiff filed a rebuttal November 21.

After obtaining enlargement, Defendant answered the Complaint November 21, 1988,

and upon Motion of the same day, obtained an enlargement to January 13, 1989 in which to respond to Plaintiff's Petition for Class Certification. On January 8, 1989, Plaintiff petitioned for enlargement of time in which to move for a Rule 23 (c) (1) determination, and was allowed to March 30, 1989.

On January 12, 1989, Defendant filed its Motion for Summary Judgment, Memorandum in Support, Evidence in Support, and Facts as to Which There is No Genuine Issue and Proposed Conclusions of Law; Motion to Strike Affidavit; Memorandum in Opposition to Petition for Class Certification; and Motion to Strike Claims for Exemplary Damages and Liquidated Damages.

On January 13, 1989, Defendant filed its Request for Reconsideration of the enlargement granted Plaintiff as to Rule 23 (c) (1) determination, and also filed a

Motion for Stay of Discovery on Class Issues. Plaintiff responded to the Request and Motion for Stay January 31, and obtained by order of January 30, an enlargement to February 29, 1989 in which to respond to the summary judgment motion.

At a February 1 hearing, the Court vacated the order setting the March 30 date in which to "move for class certification"; stayed discovery on class issues; denied the petition to restrict solicitation; and denied the petition for an order prohibiting destruction or removal of records.

Plaintiff on March 1 filed her Response to Motion to Strike, Motion for Enlargement of Time as to Summary Judgment (an Exhibit hereto), and Response to Motion to Strike Claims for Exemplary and Liquidated Damages. Defendant responded as to the enlargement as to summary judgment March 3, and on March 7 moved to strike

Plaintiff's First Request for Discovery. Plaintiff in turn filed her Reply as to enlargement relating to summary judgment, Motion for Leave to File Rule 56(f) Affidavit Out of Time, and extensive Evidence in Support of Motion for Enlargement of Time to Respond to Motion for Summary Judgment, on March 10, 1989.

Also on March 10, Defendant filed its Reply to Plaintiff's Response to Motion to Strike Affidavit. On March 13, Defendant filed its Opposition to Plaintiff's Motion for Leave to file Rule 56 (f) affidavit Out of Time. A Court entry of March 17, 1989 showed the Motion of Defendant to Strike the Claims for Exemplary and Liquidated Damages granted. On March 20, the Court made an entry granting in part and denying in part the Motion for Enlargement as to Summary Judgment. Defendant on March 21, 1989 filed its Rule 11 Motion for Sanctions

and Supporting Memorandum.

On April 7 and 12, 1989, the Court made an entry addressed to discovery disputes and gave plaintiff until May 10, 1989 in which to respond to the Rule 11 Motion. Plaintiff on April 19 filed her Brief as to the Timeliness Issue in the Summary Judgment Motion, and Motion to Publish Depositions. On April 24, Plaintiff amended her first discovery request, and Defendant withdrew its Motion to Strike Plaintiff's first request for discovery on April 25.

The Response of Plaintiff to the Rule 11 Motion was filed May 11, 1989. Defendant filed its Response to the Reply Brief on timeliness May 12, and its reply as to Rule 11 May 19.

On June 6, 1989, the Court served a Notice of Request for Information. This alleged that the judge belonged to Ambas-

sadaire Travel Club, which operated out of the ATA Building, and as a member of that club flew on planes with "American Trans-Air" on the fuselage. On June 20, 1989, ATA disclosed that Ambassadair Travel Club, Inc. and American Trans Air, Inc. were two of five wholly owned subsidiaries of Amtran, Inc., 100% of the shares of which were owned by one man; all operating from the same building; and with all Ambassadaire flights taken on American Trans Air planes. Defendant also filed a Supplemental Memorandum in Opposition to the Petition for Class Certification June 5, 1990.

On May 8, 1991, the Court allowed publication of depositions, and granted in part and denied in part the order for summary judgment as to timeliness. On May 23, it made an additional entry on the Motion of Plaintiff for Enlargement of Time, Motion for Leave to file Rule 56 (f) Affi-

davit Out of Time, the Petition for Class Certification, the Motion to Strike Affidavit, and the Motion for Summary Judgment.

Plaintiff filed on June 7, 1991, her Motion for Rule 59 and 60 relief. Defendant responded, after receiving enlargements, July 12, 1991. Also after enlargements, Plaintiff filed her reply August 27, 1991.

The Court made an entry October 20, 1992 discussing the Rule 59 and 60 Motions and the Rule 11 Motion of Defendant, and Defendant made its verified submission requested by the Court October 30. Plaintiff filed her response to the submission November 16, and Defendant replied November 24. The Court made its entry as to the amount of sanctions December 2, 1992.

Plaintiff filed her Notice of Appeal January 4, 1993, and her jurisdictional statement the same day. Jurisdiction on

appeal was based on 28 U.S. Code Sec. 1291. The Trial Court made its Nunc Pro Tunc Entry January 8, 1993. After briefing on an issue of timeliness of appeal, the Court of Appeals made a March 31, 1993 entry on that issue. After briefing, oral argument occurred October 29, 1993. The Court of Appeals issued an opinion February 28, 1993. Enlargement was obtained and then a Petition for Rehearing and a Suggestion for Hearing In Banc filed, and denied May 4, 1994. Defendant filed a Motion to Amend the opinion on May 6, seeking to remove the name of the company president from the opinion at certain points, and plaintiff responded. The Motion was granted May 18, 1994, the opinion was modified, and the changes are reflected in the copy of said opinion submitted herewith.

B. Factual.

Most of the Appendix references below are to Appendices A-E to this Petition. (Any references to "Sh A" and "Se A" below are to the short separate appendixes respectively, of Chamber's Brief to the 7th Circuit, not appended to this Petition, and there are some references to depositions, also not made appendixes to this Petition, in case the Court looks at those items.)

Becky Chambers was a young single female employee of American Trans Air, Inc. ("ATA"), one of the largest charter airlines in the world, with headquarters in Indianapolis, Indiana. She worked there from October, 1982 to July, 1987, most recently as a crew planner. Se A 1, Complaint. Chambers was demoted from the position of Contract Administrator Supervisor, and further asserts a less qualified male was promoted over her in 1983 (App D, p. 11). She was at another

time in 1983, given the duties of Contract Supervisor, but no pay increase. (App D, p. 11, para. 5 and 6; Se A 1, p. 6) She got no pay increase when promoted in August 1986 to Crew Planner, or in November or December of 1986, when she acted as Senior Crew Planner. (Sh A 1, p. 6) A Lon Lett was also promoted over her, she asserts, March 20, 1987. (Sh A 1, p. 6). On another occasion, a new male crew planner, John Petreiksen, was hired at a salary higher than hers. (Dep Becky Chambers, Se A 5, p. 226) She was required to supervise the work of males she had trained, without the status or pay. (App. D, p. 16; Sh A 1, pp. 174, 270, 299, 305).

In addition to the above, Ms. Chambers asserts that the company was beset by chauvinism at the highest levels, and this was true on lower levels as well as in management. She further asserts females

were referred to in vulgar sexist language by the highest levels. (EEOC claim narrative, set forth verbatim below). See also App. D, pp. 1-7, Affidavit of VP and General Mgr Ed Latimer, revealing how the president of the company referred to women in administration as "cunts", and called the head flight attendant the "head screw" (pars. 12-14). The complaints beyond payroll and promotion have been described as heavier workloads, harsher discipline, and an overtly hostile atmosphere, as detailed below. Plaintiff felt a sexist mentality pervaded the company. The above affidavit of Ed Latimer, who remained Vice President and General Manager of ATA until late 1987, also stated that females were laid off while on maternity leave and not allowed to return (par. 7); male managers were paid considerably larger incomes than female for comparable work (par.8); the

president of the company had said they needed a man as manager of interlining, though women fill the position at many airlines (par. 9); the vice president for maintenance and engineering kept women at the bottom of the hierchy in maintenance, and resisted appointment of a more qualified woman to a computer slot in favor of two men (par. 10); women in operations tended to be paid much less than men (par. 11).

Additionally, observations of co-workers included (1) numerous examples of women replaced by men paid double the amount the women were paid, (2) women who had comparable responsibilities, but were given clerical titles and correspondingly lower pay than men with the same responsibilities; (3) women who were replaced or demoted while on maternity leave, vacation or out of town on business, after infrac-

tions which for men resulted only in verbal or written warnings; (4) only men were given large raises by the president of the company, who called them in personally to give them; (5) men hired later than women for identical positions, with no experience, were paid more than the women; (6) men were given more favorable hours to attend school or work overtime, while women were not; (7) many positions were not posted, and the company had a policy never to post upper level positions; (8) none of the top 26 positions were occupied by women the first 14 years of the company's existence, (9) a male supervisor locked the door of the women's restroom, so a key had to be requested from him; and (10), in clerical departments, almost exclusively female, the supervisors were generally male. (Affid of Gordon Dempsey, App. D, p. 41). These points were established in

interview notes, offered to the Court for in camera review (id).

Ms Chambers herself testified in deposition to the unbalanced workload between men and women (Dep Becky Chambers, SE A 5, pp 80-84); that women were reprimanded for things men were not (id, p. 79,80); that men were allowed to travel to visit their accounts, but women were not (id, p. 79); that Ms Chambers was demoted on pretextual grounds, with a less qualified male put in a supervisory position (id, 73, 92-94, 113-115, 117, 119-120, 133) [App. D, para. 4, pp. 10-11)]; and that unequal pay was part of the problem (Se A, pp. 205, 258). She complained about it several times (id, 87, 258, 275). As of June of 1987, Ms Chambers was being paid less than the newest and highest paid planner, who was male. (id, p. 226). Co workers confirm the gross

imbalance of work between female and male crew planners in Ms Chambers' work area. (App. D, p. 41). Ms Chambers also testified that she was harassed by her supervisor, another young single female, who was generally nasty to her because Ms Chambers was a single woman. (App. D, para. 9, pp. 17-21); Dep of Becky Chambers, Se A 5, pp. 173-179, 213, 215, 232). Ms Chambers was characterized by co workers as tending to keep to herself, but generally getting along, and Ms Knowles as gregarious, and active in her relationships with male superiors. (App. D., Affidavit of Gordon Dempsey, para. 14 [d], p. 40 et seq; and Dep of Becky Chambers, Se A 5, p. 182). Particulars include; (1) John Piburn, supervisor of both Ms. Knowles and Ms Chambers, was always touching women, and the rumors were that a woman had to become romantically involved with him to get

anywhere; (2) Ms Knowles liked the men and made an effort to get along with them, but indicated to women that dealing with them was a "hassle"; (3) Laura Knowles was "flirty", "slept around" and that the (male) crews liked her; (4) Ms. Knowles predecessor in her position, Bob Gray, first, was paid twice what Ms Knowles was paid, and second, was terminated for sex harassment. (App. D, id). Ms Chambers testified that Ms Knowles went out of her way to give undesirable trips to female flight attendants she did not like, but had no information she did this with males (Dep, Se A5, p. 176). In her Deposition, Ms. Chambers described Ms. Knowles as "loose". (App. B, id pp. 38-40).

Ms. Knowles testified that she often had non-boyfriend male, rather than female, roomates in her apartment (Dep Ms. Knowles, Se A 6, pp 9, 107); Ms Knowles also

testified that Piburn came onto female employees, was always touching them and trying to get them to go to dinner with him, though married. (id, pp. 125,126) (id, pp. 38-40). (App. D, pp. 38-40).

Ms. Chambers wrote a June 29, 1987 memo insisting that certain conditions, including unequal pay and unbalanced work load, be corrected, or she would resign. (Se A 7). She resigned, although that is not what she wanted (Dep of Becky Chambers, Se A 5, pp. 209, 245). (A young, single female secretary, Sharon Sircy, quit in tandem.) Ms Chambers felt the conditions were allowed to become very difficult, because Ms Knowles felt threatened, and hoped she would quit. (App. D, Affidavit of Gordon Dempsey, para. 9, p. 19; para. 13, p. 31; Dep of Becky Chambers, Se A 5, pp 173-179, 213, 215, 232). Chambers filed her EEOC (Se A 2) charge January 5, 1988.

The narrative read:

"I started at American Trans Air about five years ago, and was put in scheduling about a year and a half ago. I trained atleast 3 males, who started after me. A pattern developed in which I would be required to check their work and do part of it, but they were paid more money, probably averaging $2,000 to $3,000 per year more. In about late June, 1987, I wrote asking that the inequity be corrected, along with an inequity relating to a co-employee, if I were to continue working there. On July 9, I was advised to leave at once, although my last day would be shown as July 16, 1987.

Witnesses formerly in management will confirm chauvinism at the highest levels of the company, and a pattern of paying women less money for comparable positions or responsibility. This is true both on lower levels and in management. The undersigned has taken statements showing that not only were women given unequal pay for comparable positions, but females, including those in management, were routinely referred to in vulgar sexist language in their absence, by the highest levels of management."

Chambers sought and obtained a notice of right to sue July 13, 1988, and commenced this suit (SE A 1) October 11, 1988.

The facts, relating to the acts or omissions for which Rule 11 assessments

omissions for which Rule 11 assessments occurred, are as follows: The Complaint filed in October, 1988 sought exemplary and liquidated damages, for humiliation and emotional distress (Se A 1). In its answer, ATA denied that such relief was due. In the November 19 and 21 deposition of Ms. Chambers, ATA delved into the distress that would support the liquidated and exemplary damages claim. It gave no indication to counsel there could be no factual issue, and made no request prior to or during the deposition, that they be dropped.

ATA wrote counsel a letter January 6, 1989, alleging 6 paragraphs of Rule 11 violations, with the claims of exemplary or liquidated damages itemized as paragraph 5. (Se A 8, Ex A to ATA's Rule 11 Motion). The undersigned called Mr. Utken the first business day after the letter was mailed,

January 9, to attempt to go over the letter point by point. Mr. Utken cut off the conversation, prior to reaching paragraph 5, and said we would have to complete the conversation "another day." Three days, later, he filed ATA's Motion to Strike Claim for Exemplary and Liquidated Damages. (Se A 9, Response of Plaintiff to Rule 11 Motion, p. 1)

Chambers obtained an enlargement in which to respond to several motions, including the motion to strike, and formally withdrew the claims for liquidated and exemplary damages March 1, 1989 at the time she filed other papers due in the case. The withdrawal was based on an acknowledgement that their inclusion was a drafting oversight. (id, p. 3; Sh A 3, Entry of October 20, 1992, page 17). There is no other evidence of any active pursuit of the liquidated or exemplary damages

claims by Chambers after ATA's January 6 letter, or active defense by ATA, prior to the withdrawal by Chambers in tandem with other pleadings.

ARGUMENT

I. RULE 56(f).

The Court should grant Certiorari in this case to set out meaningful limits, on abrupt summary judgments in Title VII cases.

It should clarify that (1) Rule 56(f) affidavits are not to be treated as mandatory to obtain enlargement, in the absence of a discovery cutoff, or in the early stages, of a Title VII case. It should also clarify that, (2) when affidavits are required, in a Title VII case, the duty of the nonmoving party is not to produce affidavits in admissable form from all pertinent witnesses, but to disclose in a pleading, subject to the

requirements of Rule 11 when signed by counsel, evidence available to said party at the time. The Court should clarify that (3) nonmoving parties are not required to characterize the evidence then available as inadequate, to seek additional discovery. Finally, that (4) particular caution is required in Title VII cases, and on facts like these, as set forth below, the required caution did not occur.

In broad terms and as related to the above points, the opinion of February 28, 1994 contravenes Celotex v. Catrett, 477 U.S. 317, 322, and related cases set forth below, because Chambers was conforming to the reasonable requirements of the rule, to avert summary judgment before "adequate time for discovery." See Martin vs. D.C. Metropolitan Police Dept., 812 F. 2d 1425, 1436

(D.C. Cir. 1987), where Judge Ginsburg

that summary judgment is inappropriate until all discovery has been completed, especially where crucial facts are in the possession of the moving party.

Suit was filed October 11, 1988. Various activity occurred in the case, during the 3 months prior to the summary judgment motion of January 12, 1989-- Plaintiff had (1) completed the substantial investigation reflected in the various witness statements referenced in the Rule 56 (f) affidavit (App. D, pp. 40-43), (2) taken the deposition of Ms Knowles, (3) prepared, modified and served written interrogatories, (4) filed a motion designed to preserve documents, and (5) dealt with various procedural motions generated by ATA, during the period since filing suit in October, 1988 (see Statement of Case, Procedural above, also set forth in Chambers' response to the Rule 11

Motion, Se A 9).

Chambers got one enlargement to March 1, 1989. Her Motion of that date for additional enlargement is App. E. That motion--

a. Pointed out at paragraph 1, the failure of defendant to ferret out any of the underlying facts, with written discovery or depositions, other than one deposition of Ms Chambers, and

b. Pointed out at paragraphs 6 and 7 the pending discovery relating to Ms Chambers individually, and pointed out how it was directed at (1) statistical patterns in Ms Chambers section, related sections, or sections requiring comparable tasks, (2) facts that could tie Ms Chambers specific experiences to the notable animus at the top, (3) specific similar occurrences, and (4) details of relationships of persons controlling Ms Chambers or her section, all

controlling Ms Chambers or her section, all of which would be essential to fill the gaps.

Page 22 of the Brief of Chambers to the 7th Circuit points out additional factors known to the Court then--there was no discovery cutoff, or trial date. The court on February 1, 1989, had required Chambers to alter her written discovery directed at defendant. Chambers had class and individual aspects of the claim to address, and could not know what the arguments for summary judgment would be, and thus what discovery would be required (atleast not comprehensively) to rebutt them, before seeing the Motion.

Chambers tendered her extensive affidavit of counsel March 10, 1989, before any ruling on her March 1 Motion. (Se A 4).

As to (1)--Rule 56 (f) affidavits not

mandatory before discovery cutoff or in early stages.

Even the 7th Circuit has not held that a Rule 56(f) "affidavit" is the exclusive basis for enlargement of time in which to respond to summary judgment. That would be anomalous at best, since an affidavit is not required to get summary judgment itself. Otto vs. Variable Annuity, 814 F. 2d 1127 (7th Cir 1986), cited by the Court at page 4 of the February 28, 1994 opinion, does not hold that failure to assert grounds in affidavit format is fatal. It was based on failure of the Motion for enlargement to show, among other things, how the discovery might help resist the motion. Page 1138.

See Martin vs. D.C. Metropolitan Police Dept., 812 F. 2d 1425 (D.C. Cir. 1987). The factual basis for the motion for enlargement was set forth in

a Motion (see p. 1435)--Judge Ginsburg found the factual basis insufficient to rebutt the summary allegations, but not based on the fact they were not in affidavit form. She did reverse, and required additional time for discovery on the summary judgment issue, even though governmental immunity was in play. See ftnote 22 of Judge Ginsburg, as to the dynamics.

See American Nurses Ass'n v. Illinois, 783 F. 2d 716, 729, cited in fact in the February 28, 1994 opinion. The court in that case pointed out the proper course is to ask for more time (not saying by affidavit), and there, the plaintiff apparently did not ask.

In view of The special importance of latitude in discovery in Title VII cases, reiterated in Carter vs. AT & T Communications, 759 F. Supp. 155, (S.D.N.Y.

1991), at 159, citing Price Waterhouse vs. Hopkins, 490 U.S. 228, 247, n. 12, this Court should adopt the DC Circuit view, and articulate that affidavits should not be required, before a discovery cutoff, or in the early stages, of a Title VII case.

As to (2), nature of affidavit when required--

A Rule 56 affidavit need not present proof, but should show the existence of the proof. For purposes of Rule 56 (f), an affidavit of counsel, showing the Court what evidence the nonmoving party has, is a common practice. Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d, Sec. 2740 (1983). Cited at p. 19 of Se A 4. See also 116 F.R.D. 166. And Martin, supra. Para. 14 of Se A 4 addressed the witness statements, and discovery needed, in detail.

The statement of the 7th Circuit that

Chambers "never put forth any evidence" is incorrect under the Martin approach, as is the assertion that Chambers was claiming it was "unrealistic to expect her to be able to come forward with facts." Where many witnesses have been interviewed, as here, it is unweildy to try to obtain affidavits from all of them. If the Court or opposing counsel felt that should be necessary, even after tendering the notes to the Court (Se A 4, para. 14 (d), just to support further discovery, it could be required.

As to (3), alternative argument allowed--

The language in Rule 56 (f) causes recurrent rhetorical problems. The 7th Circuit appeared to embrace the view that the nonmoving party must pursue only one alternative or the other, as the district court apparently saw the matter. They read the phrase

"should it appear from the affidavits of a party opposing.." to mean that a nonmoving party cannot seek additional time under Rule 56(f), without characterizing the evidence available thus far as inadequate. Since a nonmoving party cannot know many times whether the court's view of "adequate" conforms to that of the nonmoving party, it seems reasonably clear the nonmoving party should be allowed to proceed in the alternative. The phrase should be read to mean appear to the court. If the court views the disclosures before it as sufficient to show summary judgment should be denied and denies it, no enlargement is needed. If insufficient or possibly insufficient, time would normally be allowed, especially in the early stages, and in the absence of a discovery cutoff. Should not this Court go ahead and say that?

where the caution shown is inadequate--

This Court should adopt a period, or criteria, which create an inference of adequate time under Celotex. In this case, the Court decided 5 months--as the Court said, enough time to complete "atleast some discovery"--was adequate. Chambers submits that especially with (1) no discovery cutoff, (2) no trial date, (3) the extensive activity and submissions during the 5 months, (4) the amount of information in the Rule 56 (f) affidavit supporting a claim on the merits, and (5) the short period since filing, it was abuse of discretion to deny further discovery in this case. The timing threshold for summary judgment--after adequate time for discovery, per Celotex--was never reached.

The Court has in effect said--Chambers had enough time to do atleast some

discovery. The summary judgment is based on her deposition. So she can't do any more discovery, in spite of the problems with Piburn, with the predecessor to Laura Knowles, Mr. Gray, with Ms Knowles herself, and the pattern all the way to the top. (App. D, pp. 38-41).

Its not reasonable, under the rule or the cases applying it.

See Glen Eden Hospital Inc. vs. Blue Cross/Blue Shield of Michigan, Inc., 740 F 2d 423 (1984) in which the 6th Circuit reversed, for failure to allow completion of discovery. The court noted that if there was "inactivity", it was not plaintiff's fault. (Here, the activity was substantial). The court at page 428 cited First National Bank vs. Cities Service Co., 391 U.S. 253, in which 5 years had lapsed. In Celotex, supra, it was several years. See American Nurses Ass'n v. Illinois, 783

See American Nurses Ass'n v. Illinois, 783 F. 2d 716, cited in fact in the Feruary 28, 1994 opinion. That case involved a plaintiff which had "sat on its hands" for "years".

Carter also pointed out that enlargements are to be allowed "with a spirit of liberality", citing 10A Wright, Miller & Kane, Federal Practice & Procedure, sec. 2740 at 532 (1983) [even outside Title VII]. See also Holland vs. Jefferson Nat'l Life Ins. Co., 883 F 2d 1307, 1312 (7th Circuit, 1989).

See also Garrett vs. City and County of San Francisco, 818 F.2d 1515 (9th Cir. 1987), reversing for failure to allow discovery, even where it was uncontroverted that the terminated fireman/ plaintiff had taken some silver dollars from a fire scene.

(Were white firemen being reported and

fired for such pilferage?).

See also Cowan vs. J.C. Penney, 790 F. 2d 1529 (11th Cir, 1986), where plaintiff brought to the Court's attention that discovery was outstanding, as here. In the 1st Circuit, see

Berrigan vs. Greyhound, 782 F. 2d 295 (1986)--if information is in the hands of the defendant, and there is a fair likelihood the plaintiff would obtain material information, summary judgment is to be denied.

Chambers submits that Judge Ginsburg set the correct tone in Martin, and the other cases cited are consistent with it. The opinion of February 28 herein is not. This court should hold that summary judgment will be reversed, when applied to a Title VII case, in the posture of this one.

Chambers adds a comment about Celotex,

probably the case cited more than any other in the U.S. on summary judgment, and Matsushita Electric vs. Zenith Radio, 475 U.S. 574, 587. Matsushita says summary judgment shall be granted if the evidence "could not lead a rational trier of fact to find for the nonmoving party."

The standard is in reality largely arbitrary, and to that extent, transfers enormous power away from the jury and to the district, and the appellate, judges. What percent chance is "rational"? Some judges will and do treat the standard as an invitation to decide the case, and will conclude that a "rational" trier of fact is one who agrees with them. The point is not to suggest that relationships to defendant, its counsel or both, gain ascendency, here or in general.

II. Failure to Promote.

The 7th Circuit omitted part of the

EEOC claim language. The first paragraph said Ms Chambers trained males, and then had to check their work, or actually do it, while being paid less money. (Set forth veratim above). Also, Brief of Chambers to the 7th Circuit, p. 23. It is highly unlikely an investigator could look into that, without looking at promotions.

The opinion of February 28 fails to follow Babrocky vs. Jewel Food Co, Retail Meat Cutters Union, 773 Fed. 2d 857, 864 (7th Circuit, 1985) Rush vs. McDonald's Corp., (7th Circuit, 1992), 996 F. 2d 1104, or especially Jenkins vs. Blue Cross Mutual Hosp. Ins. Co., 538 F. 2d 164, 167 (7th Cir, 1976). Pages 7 and 8 of Chambers' Reply Brief to the 7th Circuit. This Court should find that the purpose of the EEOC claim is to set forth the operative facts, to put the EEOC on notice of what to investigate, and anything reasonably likely

to be observed in the course of such investigation, may be included in the subsequent civil complaint.

In Rush vs. McDonald's Corporation, (7th Circuit, 1992), 996 Fed 2d 1104, located by Chambers in preparing her Reply Brief. Rush alleged only termination because she was black, in her EEOC charge (page 1110 and n. 9). At the same time, she submitted a 3 page separate affidavit in support. The affidavit contained 3 sentences about a white person who had advanced quickly, and asserted blacks advanced less quickly. (p. 1110, and n. 23). Her Title VII suit alleged termination, promotion, benefits, and harrassment. This Court found the termination, promotion and benefits to be reasonably related.

In Jenkins vs. Blue Cross Mutual Hosp. Ins. Co., 538 F 2d 164, 167 (7th Cir,

1976), an EEOC charge alleging a black woman was fired "because of her Afro hairstyle", was held to support a sex discrimination claim. She mentioned in her narrative that she was a leader of the women, and the possibility a white woman may have been denied a promotion for associating with her. Though the claim on its face was for race, this Court found the reference in the narrative supported a later suit based on sex. See Babrocky, supra, at 864. Both Babrocky and Jenkins were cited to the trial court at page 14 of Se A 4, p. 14. If this Court articulates the point sought, it will leave the 7th circuit within the parameters of its own prior decisions.

Chambers submits the Trial Court could narrow Chambers claims so severely, only by a totally "crabbed" analysis.

III. Wage Discrimination.

inability to show wage discrimination may be due to the granting of summary judgment, before Chambers had completed much discovery. (App. A, pp. 20-23). See I above.

IV. Heavier Work Loads, Hostile Environment.

The first paragraph of the EEOC charge raises heavier work loads. See II above--having to basically supervise, while being paid less, or no more than the males in her section. Complaint, para. 11 (b). These were documented in the statement of the case, factual, above.

The Court acknowledges in the February 28 opinion (App. A, p. 23) that there is perhaps enough evidence in the record to survive summary judgment, as to hostile environment, but stresses that the argument was "not developed by Chambers on

appeal." The trial court granted summary judgment as to hostile environment, based solely on the trial court's view that it was not embraced in the EEOC charge. (App. B, p. 29, p. 61). Chambers did not argue the elements of Meritor Savings Bank vs. Vinson, 477 U.S. 57, and related cases, because whether such elements were present was not the basis of the summary judgment. Normally, on appeal, a party should not be required to cite law and evidence for every aspect of her claim, whether it formed the basis for the summary judgment or not. Plaintiff did cite various cases addressed to the reason relied upon by the trial court (i.e., time barred) at pages 18-20 of her Brief. She also pointed out that the EEOC charge alleged chauvinism at the highest levels; that women were referred to in vulgar sexist language; and discussed at the bottom of page 19, the harsh and

"rough" treatment as a manifestation of the chauvinism. She further addressed the reasons relied upon by the trial court, at pages 11-12 of her Reply Brief.

Chambers should, however, be allowed to proceed as to hostile environment, under Meritor, supra, and Harris vs. Forklift Systems, Inc., 114 S. Ct. 367 (1993). The case at hand was argued October 29, 1993, and Harris was handed down November 9, 1993. Harris affirmed the holding in Meritor that when the workplace is permeated with "discriminatory intimidation, ridicule and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment", Title VII is violated. (Harris, p. 370).

Harris went on, however, to also hold that the conduct need not cause a "tangible

psychological injury." The conduct must create an environment that a reasonable person would find hostile or abusive, and the victim must subjectively perceive the environment to be abusive, but no "tangible psychological injury"
must be shown. (370, supra).

The affidavit of Exec. V.P. and General Mgr. Ed Latimer (App. D, pp. 1-8) shows an environment a reasonable person would find abusive. So do various statements by fellow workers, placed before the Court in the affidavit of counsel, enumerated above. The testimony of Chambers in deposition, also articulated in the Statement of the Case, Factual above, including her view that she was targeted because she was a single woman, and the fact Ms Knowles felt threatened) would support a finding by the trier of fact, that Ms. Chambers subjectively perceived

that Ms. Chambers subjectively perceived the environment as abusive toward her personally. See also the cited problems with Laura Knowles, Gray and Piburn, and the discussion in para. 11 of the affidavit of counsel, relating to attempts by ATA to inaccurately characterize Chambers' testimony.

The above deposition cites aside, Chambers also notes that the Court in Harris did not say the plaintiff had to perceive the abuse as due to the discriminatory environment, just that she had to perceive the environment as abusive. If the environment was abusive to the plaintiff, and other evidence shows it to be caused in significant part by the discriminatory factors, that should suffice. If the father abuses the daughter, and the daughter abuses her younger sister, the younger sister may or

may not know why it is occurring. The pattern here is evident from the top down, and Chambers should also be allowed to discover. Even if the totality of circumstances as of March 1, 1989 had not indicated a good case, one must be able to obtain discovery to know them, before it can be determined. Saxton v. AT & T, 10 Fed 3rd 526.

Note Harris has not been read to be limited to "sexual" or "harrassment". See Atonio vs. Wards Cove Packing Co., Inc., 10 Fed 3rd 1485 (9th Cir. 1993), re race, and Kopp vs. Samaritan Health System, Inc., 13 Fed 3rd 264 (8th Cir. 1993), addressing abusive, nonsexual behavior.

It is difficult to conjecture what mixes of fact and law the Court will seize upon as deserving attention, in a Petition for Certiorari. This case might be viewed as timely, in the wake of Harris. The

whether the perceived abusive atmosphere must be tied in the mind of the worker, to the underlying discriminatory factors. Where the Court on Appeal suggested there was enough evidence in the record to support the claim for hostile environment, this Court may feel the need to intervene, to prevent the failure to brief that point on appeal from working against the female employees, when the point was never part of the trial court's basis for granting summary judgment, and therefore, there was no reason for Chambers to discuss Meritor or Harris in her brief on appeal.

V. Constructive Discharge.

The Court on appeal has stated that Chambers cannot show the conditions were discriminatory, because she testified she could not attribute them to sex discrimination (App A, p. 27). There may

have been certain instances or aspects as to which that was true, but see the various deposition cites rebutting that, above. The "showdown" was a fairly predictable result of the atmosphere pervaded with sexuality (Mikelsons, Piburn, Gray, Knowles) and the obvious threat Chambers, as a young single attractive female, therefore posed to Knowles. This combination does not even support discovery??

VI. Class Certification.

Allowing discovery, and/or recognizing one or more claims without such discovery, should bring reversal of the certification denial. The Court may also see this as an appropriate case, in which to clarify (1) substitution of class representatives as the normal course, even if not reversed on the above grounds, and (2) the rights of prospective class members to proceed, on

prospective class members to proceed, on failure of this action.

Even if reversal did not occur as to Ms Chambers, that should not be dispositive on the separate issue, of whether (1) the class claim may be pursued, or (2) Ms Chambers may litigate on behalf of the class. Newberg, Class Actions, Sec. 24.31. Rule 23 (a). U.S. Parole vs. Geraghty, 445 U.S. 388, at 404 (1980). See Martin vs. Thompson Co, CA Ala 1973, 486 F 2d 510, in which the class had not been certified. Consor vs. Occidental Life, DC Tex 1979, 469 F Supp 1110, confirms at footnote 2, that whether certification had occurred is beside the point. The fact that the individual may act for the class, though her claim may no longer exist, was confirmed in Love vs. Turlington, DC Fla 1984, 733 F 2d 1562, and Barthel, et al vs. Illinois Central, (Ill. 1978), 384 N.E. 2d

316, 322. See annotation paragraphs 524, 534 and 536 to USCA Rule 23. The 7th Circuit addressed the issue in ftnote 7 of Young vs. Lane, 922 Fed 2d 370, 373 (1991).

The correct step is to allow substitutes. Rule 23 (a). Taylor v. Kerr DCNY, 1977, 73 FRD 691. Wright, Miller and Cooper, p. 420, n. 52. Chambers sought a hearing on substitution of class representatives at the end of her Rule 59 Motion, and the normal course is for the trial court to allow that.

ATA cited in its brief to East Texas Motor Freight vs. Rodriguez, 431 U.S. 395. In that case, the potential plaintiff did not even move for certification by the time of trial. Also, plaintiff was a city bus driver, not a line driver, and a stipulation of no discrimination in hiring basically prevented him from representing the line drivers. The case is not com-

parable. Chambers is not categorically distinct form other female employees.

This case is an opportunity for the Court to establish a presumption, that the trial court should allow substitution of class representatives, where, unlike in East Texas, the individual whose claim has failed is fairly representative.

VII. Rule 11.

The Rule 11 order, issued for seeking exemplary and liquidated damages under Title VII, was entered December 4, 1991, along with the summary judgment on the remainder of the claim, after a November, 1991 effective date, for the statute allowing compensatory and punitive damages in Title VII actions, 42 U.S.C. 1981(a). The new sec. 1981 provision has been held applicable retroactively, to pending cases that arose from conduct before the statute was passed. Assily vs. Tampa General

Hospital, M.D. Fla. 1992, 791 F Supp 862. The issue was also addressed in Hutchison vs. Amateur Electronics Supply, Inc., 840 F. Supp. 612, 619 (E.D. Wis 1993).

Even if the summary judgment as to the remaining issues had been final as of the November, 1991 statutory effective date, or the Rule 11 judgment had been entered by then, neither of which is true, a change in the law pending appeal, relating to fees, would be given effect. Bradley vs. School Bd of City of Richmond, 416 U.S. 669, 715-716. At worst, the Court would be controlled by the statute in effect when it rendered its decision, December 4, 1991. Thorpe vs. Housing Authority of City of Durham, 393 U.S. 268, 282. Bradley and Thorpe were cited in Hutchison.

The Court should also embrace the view that if a party neither proceeded under a claim theory not available to her, nor

sought damages not available on those facts, Rule 11 should not apply to a damage prayer. Title VII was available to Chambers as a legal vehicle, and even if the 1991 Act were unavailable to her, she could have obtained punitive damages under the law of Indiana on these facts. As addressed in Rush vs. McDonald's Corp (7th Cir 1992), 996 F. 2d 1104, 1122, Chambers could recover punitive damages for infliction of emotional distress from the supervisor who aggrieved her, under Indiana common law. She has alleged Knowles was on her, and trying to get her to quit. And it was not clear until Fields vs. Cummins Employees Federal Credit Union, 540 N.E. 2d 631 (Ind. Ct. App. 1989), that a respondeat superior recovery from the employer for such tort, was barred by the workers compensation statute. Fields was cited at page 1122 of Rush, and was handed down July

6, 1989, 4 months after Chambers dismissed her claim for exemplary or liquidated damages, from infliction of emotional distress. Thus, under Rush, there was no Rule 11 violation by Chambers. She dismissed before Fields, and Rush dismissed some months after.

Chambers would have been required to separate the common law claim out from the Title VII count. But as she reads page 1122 of Rush, she was not at the time seeking relief, that could not be recovered from this defendant. The claim was not "clearly barred by existing law." She did have available a good faith argument to seek such relief, but had it under the wrong count.

The courts, in the 7th Circuit and elsewhere, were somewhat tentative on the punitive damages issue under Title VII, on other grounds, around the time suit was

filed. The district court case of Bohen vs. East Chicago, Indiana, 799 F. 2d 1180 showed at page 1244 that until the later appellate opinion in Bohen came down in August, 1986, the 7th Circuit had not determined whether damages could be assessed. In Huddleston vs. Roger Dean Chevrolet, 845 F. 2d 900 (11th Cir, 1988) damages were allowed in a Title VII case. Huddleston was cited and relied on in Swanson vs. Elmhurst Chrysler, N.D. Ill, not reversed until August 16, 1989, at 882 F. 2d 1235.

Also, the 7th Circuit opinion in Bohen characterized damages as unavailable in Title VII cases "that do not result in discharge." 799 F. 2d at 1184. If Chambers could show constructive discharge, this language would appear on its face to raise an inference allowing damages. While much of the ambivalence in the courts about

damages centered around nominal damages, as a vehicle for other remuneration, the uncertainty led to the 1991 Act, which did allow legal damages.

For class members, the punitive and compensatory damages should also be available for damages before 1991, for any class certified after the effective date.

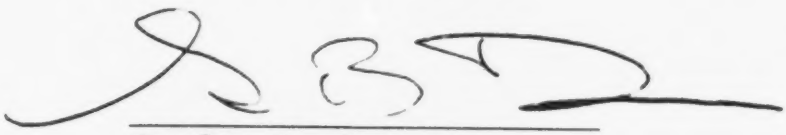
Reversing the Rule 11 assessment would also be consistent with the new Rule, which requires notice and an opportunity to respond. Chambers reacted quickly here.

While some of these arguments were not raised earlier, even the 7th circuit has acknowledged the Court should consider later arguments. Thompson vs. Duke, 940 F. 2d 195, and Mestever vs. Wisconsin Physician, 905 F. 2d 1077 at 1081 (7th Cir 1990).

This Court has an overriding interest, in clarity and fairness of how the rules

apply. Also, here Rule 11 interfaces with the retroactivity question as to the 1991 Act.

Respectfully submitted,



Gordon B. Dempsey
Attorney of Record for
Becky Chambers

APPENDIX A

7th Circuit Opinion

BECKY CHAMBERS,

Plaintiff-Appellant,

v.

AMERICAN TRANS AIR, INC.,

Defendant-Appellee.

No. 93-1057.

United States Court of Appeals,

Seventh Circuit.

Argued Oct. 29, 1993.

Decided Feb. 28, 1994.

Rehearing and Suggestion for Rehearing In Banc Denied May 4, 1994.

As Modified May 18, 1994.

Before CUMMINGS and CUDAHY, Circuit Judges, and LEINENWEBER, District Judge. The Honorable Harry D. Leinenweber, District Judge of the United States District Court for the Northern District of Illinois, Eastern Division, is sitting by

designation.

CUDAHY, Circuit Judge. Becky Chambers brought this Title VII action against her employer, American Trans Air, Inc. (ATA). Chambers worked for ATA from October 1982 until July 1987, first as a contract administrator and later as a crew planner. In June 1987, Chambers wrote a letter to her supervisor tendering her resignation, effective July 18, "pending correction" of two areas. Specifically, she demanded a pay increase, and that the company hire additional crew planners.

Rather than bowing to her demands, Chambers' supervisor accepted her resignation. After filing a charge with the Equal Employment Opportunity Commission (EEOC), Chambers brought this suit, claiming violations of Title VII, 42 U.S.C. s 2000e et seq. As the district court

interpreted her complaint (and Chambers does not here object to this interpretation), it asserts seven claims, averring that Chambers was twice denied promotions and three times denied pay increases to which she was entitled. She also alleged that she was subject to "heavier workloads, harsher discipline ... and overt hostility from her supervisor" on account of her sex, and that she was constructively discharged. She also sought certification as a class action. ATA moved for, and the district court ultimately granted, summary judgment against Chambers on each of these claims. Having no individual claim, the court also found that Chambers could not serve as a class representative. Finally, the court sanctioned Chambers' attorney under Fed.R.Civ.P. 11 for pressing a claim for liquidated and exemplary damages when Title

VII permitted no such relief. We affirm in all respects.

I. Rule 56(f).

[1] A party opposing a motion for summary judgment must "designate 'specific facts showing that there is a genuine issue for trial.' " Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56(e)). The opposing party will typically do this by submitting affidavits showing that material facts are in dispute. The court

here found that Chambers failed to show the existence of a material dispute. But that is not surprising, because Chambers never put forward any evidence purporting to do so. Instead, Chambers twice asked for more time, though she never explained (as the rules require) why more time was necessary. The court therefore examined the record in

the case as it then existed, found that Chambers had not shown the existence of a material factual dispute and entered summary judgment. Whether summary judgment was appropriate, then, turns (at least in part) on whether the court was within its discretion in deciding the summary judgment motion when it did.

Chambers' response to ATA's motion for summary judgment was less than artful. She first asked for an extension of time to respond, until February 29, 1989, and the court granted the extension. But that date did not exist. When she did respond on March 1 (which the court treated as timely), she asked for another extension of time. ATA opposed that motion.

Federal Rule of Civil Procedure 56 gives a party opposing a motion for summary judgment two choices. It can either

respond, filing an affidavit showing the existence of a triable issue of fact, Fed.R.Civ.P. 56(e), or, if it appears "from the affidavits of a party opposing the motion that he cannot for reasons stated" show the existence of an issue of fact, the court may allow further discovery. Fed.R.Civ.P. 56(f).

The first time that Chambers asked for an extension of time, the court apparently overlooked her failure to submit an affidavit explaining why more time was needed. But, when Chambers asked for a second extension of time, ATA objected, arguing that Rule 56(f) required Chambers to submit an affidavit explaining why more time was necessary. Chambers responded to this argument by moving to file a Rule 56(f) affidavit out of time, all the while insisting that she already had enough evidence to show the existence of a

material issue of fact. The court responded by giving Chambers another 30 days to address the question whether her action was barred by the statute of limitations, but otherwise reserved judgment. The court ultimately granted summary judgment in part, finding that some of Chambers' claims were barred by the statute of limitations. As to those claims that were not, the court denied her motion to file a Rule 56(f) motion out of time as well as her motion for an extension of time. It then treated Chambers' proffered Rule 56(f) affidavit as a Rule 56(e) response to the motion for summary judgment and proceeded to decide the summary judgment motion. It ultimately granted summary judgment in favor of ATA on the remaining claims.

Chambers here contends that the district

court abused its discretion in denying her motion for an extension of time. It is unrealistic, Chambers argues, to expect Title VII plaintiffs represented by busy attorneys in small law firms to respond to motions for summary judgment before they have completed

discovery. But as this court has noted, the "fact that discovery is not complete--indeed, has not begun--need not defeat the motion. A defendant may move for summary judgment at any time." American Nurses Ass'n v. Illinois, 783 F.2d 716, 729 (7th Cir.1986).

While a motion for summary judgment should not be granted unless it is abundantly clear that no material issue of fact exists, Rule 56 requires the party opposing a summary judgment motion to come forward with some evidence showing the existence of such a factual dispute. If a party cannot

present "facts essential to justify his opposition," Rule 56(f) requires that it explain why. The court is then permitted to deny the motion for summary judgment, allow further discovery, or "make such other order as is just."

Fed.R.Civ.P. 56(f). Chambers' counsel says that it is unrealistic to expect her to be able to come forward with facts. Even if this doubtful assertion is correct, Rule 56(f) expressly sets up a device by which counsel is permitted to advance this argument, the Rule 56(f) affidavit. Because Chambers' failed to file a timely Rule 56(f) affidavit, the court's refusal to give Chambers any

further time for additional discovery was not an abuse of discretion. See Otto v. Variable Annuity Life Ins., 814 F.2d 1127, 1138 (7th Cir.1986), cert. denied, 486 U.S. 1026, 108 S.Ct. 2004, 100 L.Ed.2d 235

(1988).

Satisfied that the court was not required to wait for Chambers to proffer any further evidence before ruling on the motion for summary judgment, the question is whether, on the evidence the court had before it, there existed a triable issue of material fact. As noted, the district court interpreted Chambers' complaint as asserting seven different claims: two claims for failure to promote (1983 and 1987), three claims for failure to receive a pay

increase (1983, August 1986, December 1986), one "constructive discharge" claim and one claim that she was subjected to "harsher discipline, heavier work loads and overt hostility" from her supervisor on account of her sex. The court granted summary judgment on some claims on statute of limitations grounds and

on the rest for failure to show a genuine issue of material fact.

II. Failure to promote.

With respect to the 1983 denial of promotion claim, the district court found that Chambers' claim was barred by the statute of limitations. Under Title VII, a plaintiff must file a claim with the Equal Employment Opportunity Commission (EEOC) "within one hundred and eighty days after the alleged unlawful employment practice occurred" or be barred. 42 U.S.C. s 2000e-

5(e). See Alexander v. Gardner-Denver Co., 415 U.S. 36, 47, 94 S.Ct. 1011, 1019, 39 L.Ed.2d 147 (1974). Chambers filed her EEOC charge on January 5, 1988, and any claim for discrimination that occurred before March 11, 1987 is therefore time-barred.

She argues, however, that her failure to

promote claim from 1983 should nonetheless survive on a "continuing violation" theory. That doctrine contemplates that activity occurring beyond the limitations period can be challenged if it is part of a pattern of discrimination that extended into the limitations period. See generally Douglas Laycock, "Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues", 49 Law & Contemp. Probs. 53 (1986). But we need not decide the "continuing violation" question because, even if the 1983 claim is not time-barred, it is outside the scope of Chambers' EEOC charge.

Filing an EEOC charge, of course, is a prerequisite to suit under Title VII, in order for the EEOC to have a chance to settle disputes before lawsuits are undertaken. Alexander, 415 U.S. at 44, 94 S.Ct. at 1017. As a result, to prevent

circumvention of the EEOC's investigatory and conciliatory role, only those claims that are fairly encompassed within an EEOC charge can be the subject of a resulting lawsuit. See Babrocky v. Jewel Food Co. & Retail Meatcutters, 773 F.2d 857, 863 (7th Cir.1985). Accord Schnellbaecher v. Baskin Clothing Co., 887 F.2d 124 (7th Cir.1989). Chambers' EEOC charge complains only about unequal compensation, not failure to receive promotions. The charge alleges that male employees "were paid more money," and that Chambers "wrote asking that the inequity be corrected."

Although Chambers argues that this incorporates pay inequities resulting from promotion denials, promotion is not mentioned nor do we think it is fairly implied. Therefore, since failure to promote is outside the scope of the charge,

summary judgment was correctly entered against Chambers on her claims that she was denied promotions to which she was entitled, both in 1983 and in 1987.

III. Wage discrimination.

Chambers claims that there were three wage increases that she should have received but did not, on account of her sex, one in 1983 and one in 1986. The district court found that one of Chambers' three wage discrimination claims--the one in 1983--was barred by the statute of limitations. Pay increases are typically continuing violations, because each pay check at a discriminatory rate is seen as the basis for a separate claim. Bazemore v. Friday, 478 U.S. 385, 395-96, 106 S.Ct. 3000, 3006, 92 L.Ed.2d 315 (1986). But here Chambers was briefly promoted (without a pay increase) in 1983,

and then demoted back to her previous position. The district court therefore correctly concluded that this allegedly discriminatory action had no continuing effect inside the limitations period.

But even if the claim were not time barred, summary judgment was appropriate for the same reasons that the court granted summary judgment on the two 1986 claims: Chambers has failed to show a material factual dispute. In this connection, Chambers simply puts forward no evidence of a pay inequity. Plaintiff's brief essentially admits as much, insisting that it should be allowed further discovery to adduce supporting evidence. "There were probably various wage decisions about her, of which she had no personal knowledge. Ms. Chambers must be allowed, at a minimum, to compare herself to males of similar experience and ability." Pl.Br. at 28.

But as noted, in light of the plaintiff's Rule 56 deficiencies, the district court was within its discretion in granting summary judgment without allowing further discovery.

The plaintiff's claim is that she was entitled to three pay increases, but was denied them on the basis of her sex. A plaintiff claiming disparate treatment must (1) put forward direct evidence of illegal motive linked to the challenged employment decision, or (2) establish illegal motive indirectly through the three-step model of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). As a first step in the McDonnell Douglas process, Chambers must show that as a female she was treated differently than a similarly situated male.

There are some affidavits showing general gender discrimination at ATA. For example,

Edward Latimer, a former vice president of ATA, testified in an affidavit that sexism was pervasive in the corporation, and that some women managers were paid less than male managers in comparable positions. But there is no link from this information to employment decisions involving Chambers. Liability under Title VII does not turn on the bigotry of company managers unless that bigotry resulted in injury to the plaintiff. A showing of other instances of discrimination in the company may have evidentiary value, but it is not a substitute for a showing of injury to the plaintiff. There therefore needs to be a link between an ATA's manager's alleged prejudice, and the decisions that Chambers is challenging. See Shager v. Upjohn, 913 F.2d

398, 405 (7th Cir.1990).

Lacking direct evidence, we turn to the

question whether, under the burden-shifting analysis set out in McDonnell Douglas, Chambers can survive the summary judgment motion. We find that she cannot. Because there is no evidence in the record showing that Chambers was treated any differently than a similarly situated male, based on the record Chambers cannot make out a prima facie case of discrimination. This, of course, may be due to the fact that the court decided the summary judgment motion before Chambers conducted much discovery. The record contains no evidence of what any of ATA's employees were paid. Chambers is therefore unable to point to payroll records, pay stubs or any other evidence to suggest that she was paid less than similarly situated men.

Nor is it even clear that, had the court allowed the plaintiff an opportunity for further discovery, it would have helped

Chambers' case. As the district court noted, Chambers herself testified in a deposition that she had no reason to believe that she failed to receive any of the three wage increases because she is a woman. While this statement would not entitle ATA to summary judgment if, in fact, the rest of the record contained evidence sufficient to create a triable issue of material fact, in the absence of any such evidence the district court correctly granted summary judgment in favor of the defendant on these claims.

IV. Hostile environment.

Chambers also alleges that she was subject to "harsher discipline, heavier work loads and overt hostility" from her supervisor. Title VII, of course, is not limited to economic discrimination, but rather is intended "to strike at the entire

spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily

hostile or abusive environment." Meritor Savings Bank v. Vinson, 477 U.S. 57, 64, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986). The Court recently reaffirmed this principle, and rejected the rule, adopted by a number of circuit courts, under which an employee needed to show that she suffered psychological harm in order to make out a hostile work environment claim. Harris v. Forklift Systems, --- U.S. ----, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

The EEOC's new proposed guidelines emphasize that "title VII affords employees the right to work in an environment free from discriminatory intimidation, insult, and ridicule." 58 Fed.Reg. 51266, 51267 (1993) (proposed 29 C.F.R. ss 1609.1,

1609.2). Thus, under the proposed guidelines, harassing "conduct may be challenged even if the complaining employee(s) are not specifically intended targets of the conduct." Id. (proposed 29 C.F.R. s 1609.1(e)).

Chambers insisted that she was subjected to "harsher discipline, heavier work loads and overt hostility" from her supervisor. The district court granted summary judgment for ATA on all of these claims, concluding that these issues were first raised in Chambers' reply brief. We agree that no allegation of harsher discipline or heavier work loads appears in her complaint or EEOC charge. But we disagree with this conclusion insofar as it relates to the allegation of "overt hostility." Chambers' EEOC charge alleges that "females, including those in management, were routinely referred to in vulgar sexist

language in their absence, by the highest levels of management." In our view, this allegation fairly raises the issue of "hostile work environment."

In addition, the record contains some evidence to support this charge. For example, Edward Latimer, the former vice president of ATA, said in his affidavit, that the CEO of the company "routinely referred to the chief stewardess as the 'head screw'." Latimer's affidavit also alleges that the CEO referred to other female employees in sexist, vulgar and patently offensive terms. We therefore find that Chambers did fairly allege a hostile work environment claim in her EEOC charge, and that there is perhaps enough evidence in the record on this account for her to survive the motion for summary judgment.

But even so, Chambers has not pursued a

hostile work environment

claim on appeal. Chambers' attorney argued primarily (and in our view unpersuasively) that the language in Chambers' EEOC charge alleging that she was "required" to check the work of co-employees raised the issue of harsher discipline and heavier work loads. Pl.Br. at 18-20. Chambers' appellate brief also contends that because the EEOC charge alleges "chauvinism," the "overt

hostility" claim is preserved.

As noted, there may be evidence in the record supporting a hostile work environment claim under the framework the Supreme Court laid out in Meritor and refined in Harris. But while the passing references on appeal to "overt hostility" can be viewed as an attempt to raise this issue, they are insufficient. "A party urging us to reverse a district court's

judgment has an obligation to argue why we should reverse that judgment, and to cite appropriate authority to support that argument." United States v. Berkowitz, 927 F.2d 1376, 1384 (7th Cir.1991). Chambers' counsel never once cited to Meritor or any other hostile work environment case. "We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived." Berkowitz, 927 F.2d at 1384. While there may be, on these facts, enough evidence of hostile work environment to entitle a plaintiff to go to trial, the papers filed both in the district court and on appeal make only passing reference to this claim. While the arguments below may have sufficed to preserve the issue for appeal, we will not reverse the entry of summary judgment based on skeletal snippets

of

argument without citation to authority.

V. Constructive discharge.

The district court granted summary judgment on Chambers' claim that she was constructively discharged. In her letter of resignation, Chambers indicated that she would resign unless she received a pay increase and additional crew planners were hired. But in order to state a claim for constructive discharge, a plaintiff needs to show that her working conditions were so intolerable that a reasonable person would have been compelled to

resign. Henn v. National Geographic Society, 819 F.2d 824 (7th Cir.), cert. denied, 484 U.S. 964, 108 S.Ct. 454, 98 L.Ed.2d 394 (1987). The district court found as a matter of law that the conditions were not so intolerable so as to require a reasonable person to resign.

Entry (May 23, 1991) at 21.

We affirm for a slightly different reason. The constructive discharge doctrine is a judicially-created response to the fact that Title VII, as originally enacted, afforded no damages remedy to a harassment victim for emotional trauma or even for medical expenses she may have incurred. Thus, courts have said that where conditions are so intolerable that a reasonable person would feel compelled to resign, a plaintiff may do that, and then sue for reinstatement and back pay.[1]

Where work conditions are intolerable, under the constructive discharge doctrine a plaintiff can resign, and then bring suit against her employer as if she were fired. But to be actionable under Title VII the work conditions need to be more than merely

---

[1]The Civil Rights Act of 1991, in any event, amends Titl allow a damages remedy.

intolerable--they need to be intolerable in a discriminatory way. Chambers demanded that she receive a pay increase and that the company hire additional workers. The district court found that the company's refusal to acquiesce did not, as a matter of law, make Chambers' working conditions intolerable. Perhaps that is correct, but even more fundamentally, as we explained in our discussion of Chambers' wage claims (at 6-8), there is no showing that ATA's decisions were discriminatory. Here too, Chambers testified in her deposition that none of these conditions had anything to do with her sex and that she had no facts suggesting that they did. That being the case, those conditions, even if intolerable, do not give rise to a cause of action under Title VII. VI. Class certification.

Having entered summary judgment in favor

of ATA on all of

Chambers' individual claims, the district court denied Chambers' motion for class certification as moot. Because we affirm the entry of summary judgment, we follow suit on the class action certification. An individual bringing an action on behalf of a class must be a member of the class and "possess the same

interest and suffer the same injury" as members of the class. E.g. Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 216, 94 S.Ct. 2925, 2929-30, 41 L.Ed.2d 706 (1974). Having no individual cause of action, Chambers cannot represent a class.

VII. Sanctions.

The district court imposed Rule 11 sanctions in the amount of $1,517 against Chambers' attorney for pressing a claim for liquidated and exemplary damages. When the

complaint was filed in 1988 (before the Civil Rights Act of 1991), it was clear that Title VII did not allow the recovery of liquidated and exemplary damages. Bohen v. East Chicago, Indiana, 799 F.2d 1180, 1184 (7th Cir.1986). Rule 11 requires that all pleadings be signed, and that the signature "constitutes a certificate by the signer that ... to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Gordon Dempsey, Chambers' attorney, conceded that he did not make a reasonable inquiry into the legal basis for the claim before filing the complaint, describing the claim for liquidated and exemplary damages as a "drafting oversight." On ATA's motion, the

district court imposed sanctions against him, concluding that Rule 11 sets out an objective test, and observing that an "empty head but a pure heart is no defense." Entry (October 20, 1992) at 18 (quoting Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir.), cert. denied, 479 U.S. 851, 107 S.Ct. 181, 93 L.Ed.2d 116 (1986)).

Dempsey responds in his appellate brief by saying that the district court, in attributing his error to an "empty head," was "a bit harsh". Pl.Br. at 32. Dempsey continues (referring to himself in the third person) in his own defense:

Ms. Chambers' lawyer was within 3 points of the cut-off for National Merit finalist, a state debate champion, recipient of a George F. Baker Trust Fund (see letterhead, Harvard Business School) full scholarship to one of the 3 or 4 most selective

colleges in his state [Wabash, interestingly, an all male college] and a stronger student there GPA wise than all but one of his classmates and fraternity brothers now practicing with ATA's highly prestigious law firm, Baker & Daniels. He was a stronger student by the same standard, than all but one of his classmates now practicing with any of the state's 3 largest law firms. He had 2 varsity letters in a collision sport, and was president of what may well have been the strongest fraternity on campus. He scored in the 95th percentile on the general background portion of his law boards. He was trained at a law school, where the average LSAT's are shown as exceeded by only 4 schools, in the U.S. News survey of March 19,1990 [Duke]. He has tried 31 jury trials in various parts of Indiana, and chaired 4 trial seminars,

attended by 50-350 lawyers.

Id. at 33 (brackets in original).

But unfortunately for Mr. Dempsey, this long list of accolades and accomplishments provides no defense. As we noted in Thornton, the "[t]est under Rule 11 is objective." The point is that "every lawyer must do the necessary work to find the law before filing the brief." Thornton, 787 F.2d 1151, 1154 (7th Cir.1986). That admonition applies even to lawyers who have two varsity letters in a collision sport and who were presidents of their fraternities. Mr. Dempsey failed to comply with the rule's clear edict, and the district court was correct to impose sanctions.

ATA finally moves this court to sanction Dempsey pursuant to
Fed.R.App.P. 38 for bringing this appeal. But Rule 38 sanctions are appropriate only

when an appeal is frivolous. While we affirm the district court, we do not find the appeal to be a frivolous one, and therefore decline the invitation to impose Rule 38 sanctions.

VIII. Conclusion.

For the reasons explained herein, the judgment of the district court and the order imposing Rule 11 sanctions are AFFIRMED. The request for Rule 38 sanctions is DENIED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

District Court Entries

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BECKY CHAMBERS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP 88-1203-C
	)	
AMERICAN TRANS AIR, INC.,	)	
	)	
Defendant.	)	

ENTRY GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO TIMELINESS ISSUE

I. Introduction

This cause comes before the court on plaintiff Becky Chambers's Motion for Class Certification and on defendant American Trans Air, Inc.'s Motion for Summary Judgment. Plaintiff Chambers, who used to be an employee of American Trans Air, Inc. (ATA), filed a complaint on October 11, 1988, against her former employer alleging sex discrimination in

violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e - 2000-17. The complaint alleges that ATA discriminated against Chambers on the basis of sex "with respect to compensation, terms, condition, privileges and opportunities of employment" and that this resulted in constructive discharge. See Plaintiff's Complaint, ¶¶ 8-9. The plaintiff also filed a Petition to Certify Action as Class Action with a supporting brief.

In response to the petition for class certification, ATA filed Defendant's Memorandum in Opposition to Petition for Class Certification, as well as a supplemental memorandum. The defendant argues that the plaintiff does not meet any of the prerequisites for the certification of a class action under

Federal Rule of Civil Procedure 23. Furthermore, ATA filed a Motion for Summary Judgment arguing that the plaintiff's individual claims are barred. If the plaintiff's individual claims cannot survive a summary judgment motion, then she is clearly not an adequate class representative, making class certification inappropriate. While the defendant's motion for summary judgment raises several arguments, this court ordered the parties to complete the briefing as to the issue regarding whether the discrimination charge was timely filed with the Equal Employment Opportunity Commission (EEOC). The issues raised in the rest of the motion for summary judgment were taken under advisement pending a ruling on the timeliness issue. Entry On Motion For Enlargement Of Time Within Which To

Respond To Summary Judgment Motion, March 20, 1989. Thus, this entry will only address the merits of the timeliness issue raised in the defendant's summary judgment motion. This court will not address the Motion For Class Cerification until the entire summary judgment motion is decided, which will determine if the plaintiff has any viable individual claims. This court has jurisdiction over this cause of action pursuant to 42 U.S.C. § 2000e-59(f)(3).

II. Standard of Review

Summary judgment, pursuant to Federal Rule of Civil Procedure 56, is properly granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In making this determination, this court views the record in the light most favorable to the party opposing the motion. See Morgan v. Harris Trust & Sav. Bank, 867 F.2d 1023, 1026 (7th Cir. 1989) (per curiam). The moving party has the initial burden of demonstrating that absence of a genuine issue of material fact. Celotex Corp., 477 U.S. at 323. The non-moving party must then "'set forth specific facts showing that there is a genuine issue for trial.'" Anderson v. Liberty Lobby,

Inc., 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56(e)). The non-movant cannot rely on conclusory allegations. Cain v. Lane, 857 F.2d 1139, 1142 (7th Cir. 1988).

"[A]t the summary judgment stage the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249. A court must enter summary judgment against the non-moving party if, after adequate time for discovery, the party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. "In such a situation, there can be 'no genuine

issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 322-23. Furthermore, a factual dispute must be outcome determinative to preclude summary judgment. Donald v. Polk County, 836 F.2d 376, 379 (7th Cir. 1988). Thus, the mere assertion of a factual dispute cannot defeat the motion for summary judgment. Anderson, 477 U.S. 242. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The Seventh Circuit has interpreted the language in Matsushita to mean that a summary judgment motion should be treated "like a

trial motion for a directed verdict and that 'genuine' allows some quantitative determination of the sufficiency of the evidence." Collins v. Associated Pathologists, Ltd., 844 F.2d 473, 476 (7th Cir.), cert. denied, 488 U.S. 852 (1988); see also Herman v. City of Chicago, 870 F.2d 400, 404 (7th Cir. 1989); Spellman v. Commissioner of Internal Revenue, 845 F.2d 148, 152 (7th Cir. 1988). "The trial court still cannot resolve factual disputes that could go to a jury at trial, but weak factual claims can be weeded out through summary judgment motions." Collins, 844 F.2d at 476.

Summary judgment is frequently not an appropriate resolution in a Title VII case. See Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307, 1312 (7th

Cir. 1989); Powers v. Dole, 782 F.2d 689, 694 (7th Cir. 1986). However, summary judgment is not automatically inappropriate simply because issues of discriminatory motive or intent are raised. See Holland, 883 F.2d at 1312. As the Seventh Circuit has counselled, a court must approach a question of summary judgment in a discrimination case with special caution. Id. at 1313.

III. Background

Plaintiff Chambers alleges in her complaint that she was discriminated against with respect to "compensation, terms, conditions, privileges and opportunities of employment" and that she was constructively discharged. The plaintiff testified in her deposition that "terms, conditions [and] privileges" referred only to her compensation, and

"opportunities of employment" referred only to promotions. In June 1987, Chambers informed ATA that she would resign from her job unless ATA corrected its allegedly discriminatory conduct. According to the plaintiff's complaint, ATA "refused to refrain from said illegal acts, practices and conduct" and so Chambers was "compelled to resign her position at [ATA], or was terminated." In the Plaintiff's Brief In Reply To Motion For Summary Judgment Issue: Timeliness Of Charge, the plaintiff also asserted that she was subjected to "heavier workloads, harsher discipline, . . . and overt hostility from her supervisor, because of her sex."

Specifically, Chambers challenges two promotion decisions--one promotion of a lesser qualified male to Contract

Administrator Supervisor in 1983 and a second promotion when Lon Lett was made Crew Planning Supervisor on March 20, 1987. Chambers also identified three times when she believed that she should have been given a pay increase: the first time was in 1983 when she was promoted to Contract Supervisor, the second time was in August 1986 when she went from a Crew Planner in Training to Crew Planner, and the third time in November-December 1986 when she acted as "senior" Crew Planner and when Lett left around Christmas.

On June 29, 1987, Chambers submitted a written resignation stating that she would resign on July 16, 1987, unless her salary was increased by $500.00 per year more than the currently highest Crew Planner and unless one or two more full-

time Crew Planners were hired. The letter sets forth Chambers's factors prompting her tender of resignation: the part-time temporary help was incompetent; management was not responding to complaints; the work load was unbalanced; the part-time temporary help took days off during the busiest times; previously promised help was not received; a verbal warning to the entire group should have been done on an individual basis; and there were conflicts with scheduling. On July 8, 1987, Chambers's resignation was accepted, and this was the last day that she worked for ATA.

On January 5, 1988, Chambers, by counsel, filed a charge of sex discrimination with the EEOC. On January 7, 1988, proceedings were instituted with a parallel state agency, the Indiana

Civil Rights Commission. At her request, the EEOC issued a Notice of Right to Sue on July 13, 1988. Chambers filed this cause of action on October 11, 1988.

IV. Timeliness of EEOC Charge

The filing of charges with the EEOC and the receipt of a right to sue letter are necessary prerequisites to pursuing any Title VII claim in federal district court. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Movement for Opportunity & Equality v. General Motors Corp., 622 F.2d 1235, 1238 (7th Cir. 1980). Timely filing with the EEOC is not a jurisdictional prerequisite to the maintenance of a Title VII suit; however, the time requirements do function like statutes of limitations that may bar untimely claims. Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982)

(involving administrative deadlines in suits against private employers); cf. Rennie v. Garrett, 896 F.2d 1057 (7th Cir. 1990) (overruling Sims v. Heckler, 725 F.2d 1143 (7th Cir. 1984) and extending Zipes to cover suits against federal employers).

Generally, a claimant must file a Title VII claim with the EEOC within 180 days of the occurrence of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e). However, if the claimant initially institutes a proceeding with a state or local agency that possesses the authority to grant or seek relief from the alleged discrimination, the time limit for filing with the EEOC is extended to 300 days after the discriminatory act. Id.; e.g. E.E.O.C. v. Commercial Office Prods. Co., 486 U.S.

107, 109-110 (1988); Sofferin v. American Airlines, Inc., 923 F.2d 552, 553 (7th Cir. 1991). The plaintiff argues and the defendant no longer disputes that the 300-day time period applies to the plaintiff's claim. Chambers filed her charge with the EEOC on January 5, 1988; thus, any claim for acts occurring prior to March 18, 1987, fall outside the 300-day period. The defendant does argue, however, that all allegedly discriminatory actions that took place prior to March 18, 1987 are barred; while the plaintiff argues that such acts are not barred because they are "continuing violations."

An exception to the limitations period is made for "continuing violations;" however, this concept was narrowed and redefined in United Air

Lines, Inc. v. Evans, 431 U.S. 553 (1977). In Evans, United Airlines's seniority system was challenged as discriminatory in violation of Title VII. The Court rejected the argument that present effects of past discriminatory acts occurring outside the EEOC filing period could be the basis for recovery under Title VII. The dispositive inquiry was determining whether a present violation existed. Id. at 558. The Court wrote as follows:

> Respondent emphasizes the fact that she has alleged a continuing violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be place on mere continuity; the critical question is whether any present violation exists.

Id. (emphasis in original).

Furthermore, the filing period runs from when the employee is notified of a discriminatory employment decision, not from when the employee is affected. Delaware State College v. Ricks, 449 U.S. 250 (1980) (holding that the crucial point for determining the running of the limitations period is the time of the discriminatory acts, not the time at which the consequences of the acts become most painful); Dugan v. Ball State Univ., 815 F.2d 1132, 1134 (7th Cir. 1987); cf. Lowell v. Glidden-Durkee, 529 F. Supp. 17 (N.D. Ill. 1981) (applying Ricks to allegations of constructive discharge). Furthermore, a claim that a discriminatory act occurred prior to the statute of limitations, but had an effect that occurred during the limitations period, is not timely. Lorance v. AT & T Technologies, Inc., 490 U.S. 900 (1989).

The Seventh Circuit Court of Appeals has set forth the following three situations to which a continuing violation theory may be applied.

> In the first situation, "continuing violation" is the term used to describe the rule that a violation of Title VII occurs, and triggers the time limit for filing a charge, when the employee knew or should have known that he or she was discriminated against. This rule is applied in cases, usually involving hiring or promotion practices, where the employer's decision-making process takes place over a period of time, making it difficult to pinpoint the exact day the "violation" occurred. . . .
>
> The second situation is [when] the employer's express, openly espoused policy was alleged to be discriminatory. . . .
>
> In the third situation, the plaintiff charges that the employer has, for a period of time, followed a practice of discrimination, but has done so covertly, rather than by way of an open notorious policy . . .

> . In such cases the challenged practice is evidenced only by a series of discrete allegedly discriminatory, acts.

Stewart v. CPC Int'l, Inc., 679 F.2d 117, 120-21 (7th Cir. 1982).

Chambers has alleged that she was discriminated against in violation of Title VII with respect to her wages, discharge and promotions. This court will address each allegation separately to determine if she has sufficiently alleged a continuing violation or has otherwise met the 300-day filing requirements.

First, Chambers testified in her deposition that she believed that there were three times that she should have been given a pay increase: the first time was in 1983 when she was promoted to Contract Supervisor, the second time was

in August 1986 when she went from a Crew Planner in Training to Crew Planner, and the third time in November-December 1986 when she acted as "senior" Crew Planner and when Lett left around Christmas. Her last salary increase prior to her resignation in July 1987 was in October 1986, when she received an increase of $2,000.00.

Generally, discrimination in the payment of wages is a continuing violation. See, e.g., Bazemore v. Friday, 478 U.S. 385, 395-96 (1986) (per curiam) ("Each week's pay check that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII."); Jenkins v. Home Ins. Co., 635

F.2d 310 (4th Cir. 1980) (although defendant contended that the filing period commenced when plaintiff learned about a wage discrepancy, court held that wage discrimination was a continuing violation that continued through every two-week pay period); Danielson v. DuPage Area Vocational Educ. Auth., 595 F. Supp. 27 (N.D. Ill. 1984). Thus, each pay check at the allegedly discriminatory rate may be the basis for a separate violation under Title VII as long as the employee is paid at that rate during the limitations period. Cf. Orahood v. Board of Trustees, 645 F.2d 651 (8th Cir. 1981) (alleged violation as to Orahood's pay when she was acting director ceased when she returned to her former position, so there was no present violation on which to base the continuing violation allegations).

It appears from the record that Chambers's pay checks during the 300 day filing period, i.e., after March 18, 1987, were at the allegedly discriminatory rate. Thus, she has sufficiently stated a timely salary discrimination claim because the last act of alleged discrimination, i.e., the receipt of a discriminatory pay check, occurred within 300 days of the filing of the EEOC charge. She has alleged the requisite present violation of the statute on which to base a continuing violation as to the two instances in 1986 when she felt that she did not receive a pay raise due to her sex. However, Chambers has not sufficiently shown that the lack of a raise in 1983 was connected to this alleged pattern of discrimination three years later. In 1983, Chambers was employed in contract administration at

ATA; in 1986, she was in crew planning. There is no indication that the person who made the decision (or failed to make the decision)[1] whether to give Chambers a raise in 1983 was also the person who made such decisions as to Chambers in 1986. Furthermore, Chambers was Contract Supervisor for only a 90-day probationary period in 1983 after which she was demoted back to her previous position. If Chambers was discriminated against in 1983 as to her wages, then this violation ceased as soon as she was demoted. See id. Thus, the 1983 wage discrimination claim is barred by the limitations period; the 1986 wage discrimination claims while Chambers was employed in

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[1] It appears that Chambers did not actively request a pay raise as to at least some of these incidents, but rather that she felt that she deserved a raise due to increased responsibility and ATA did not offer her such a raise.

crew planning are not barred by the limitations period since they are continuing violations and her receipt of pay checks after March 18, 1987, provide the requisite present violation during limitations period.

With regard to the constructive discharge claim, Chambers informed her employer in a writing dated July 29, 1987, that unless she received an increase in salary, then she would resign. ATA accepted her resignation on July 8, 1987, and that was the last day that Chambers worked for ATA. As discussed earlier, the filing period commences on the date that an employee is notified of his or her impending discharge. See Ricks, 449 U.S. 250; Chardon v. Fernandez, 454 U.S. 6 (1981) (per curiam). Furthermore, this "date of

notification" rule also applies to cases involving allegations of constructive discharge. Lowell, 529 F. Supp. 17.

The defendant argues that the constructive discharge claim fails because it is based upon an ultimatum by Chambers that ATA rectify its past Title VII violations that occurred outside of the filing limitations or she would resign. As ATA points out, the Supreme Court has held that "[m]ere requests to reconsider . . . cannot extend the limitations periods applicable to the civil rights laws." Ricks, 449 U.S. at 261, n.15. In this case, however, Chambers's decision to resign was not merely based upon prior alleged discriminatory acts that occurred outside the statutory time period. This court has already held that the plaintiff's

compensation discrimination claims regarding her 1986 wages were continuing violations that were based upon acts, i.e., receipt of pay checks, occurring within the statutory time period. Thus, her constructive discharge claim does not operate to expand the limitations period, but rather is based upon acts that fell within the statutory time period. Furthermore, her resignation was clearly within the 300-day time period, which makes her constructive discharge claim timely.

The plaintiff complains that she was discriminatorily denied two promotions: one promotion of a lesser qualified male to Contract Administrator Supervisor in 1983 and a second promotion when Lon Lett was made Crew Planning Supervisor on March 20, 1987. The defendant

acknowledges that the March 20, 1987, promotion claim is timely.[2] Thus, this court will only address the timeliness of the 1983 promotion. The denial of promotion (or demotion) in 1983 obviously occurred more than 300 days from the filing of her EEOC charge in 1988; thus, it is barred unless it is deemed to be a "continuing violation." The plaintiff, however, has failed to show that the 1983 promotion was part of a pattern of discriminatory acts that would support a continuing violation theory. In 1983,

---

[2] The defendant notes that Lett was promoted to this position in March and demoted in April. The position was not filled after Lett's demotion. Furthermore, it appears that Chambers did not believe that anyone should have been promoted to supervisor since it was only a two-person department. While these facts may very well go to the merits of Chambers's claim, this court is only addressing the timeliness hurdle in this entry, of which the plaintiff has cleared.

Chambers was denied an opportunity to fill (or continue to fill) a specific higher-level position. This was not a situation in which an employee was denied a series of promotions or was regularly denied a promotion that was continually available to those in her position. Rather, this was a discrete, individual instance that, if discriminatory, commenced the running of the statutory filing period. See Patterson v. General Motors Corp., 631 F.2d 476 (7th Cir. 1980), cert. denied, 451 U.S. 914 (1981) (holding that two applications for promotion that were denied for allegedly discriminatory reasons did not constitute a continuing violation). Thus, the 1983 promotion claim is time barred.

Finally, the plaintiff complains that she was subjected to harsher

discipline, heavier work loads and overt hostility from her supervisor. The defendant argues, however, that Chambers only raised these claims in her response brief to the motion for summary judgment, not in her EEOC charge or her complaint in this cause. This court agrees with the defendant that the plaintiff did not raise these claims in the EEOC charge or judicial complaint, and thus, it follows that these allegations are barred as untimely.

V. Conclusion

Based upon the above-stated reasons, this court GRANTS the defendant's motion for summary judgment as to the plaintiff's failure-to-promote claim and discriminatory wage claim based upon acts that occurred in 1983 because such claims are time-barred. The court also GRANTS

the defendant's motion for summary judgment as to any claims that the plaintiff may have tried to assert regarding allegations of harsher discipline, heavier work loads and overt hostility from supervisors; these claims are also time-barred. This court DENIES the defendant's motion for summary judgment on the timeliness issue as to the remaining specific allegations of discrimination based upon this court's determination that the plaintiff has met the statutory filing requirement as to these acts. The remaining issues raised by the defendant in its motion for summary judgment will be addressed in a later entry after this court has ruled on the plaintiff's Motion For Enlargement Of Time Within Which To Respond To Summary Judgment, which was taken under

advisement pending the issuance of this entry.

Dated this _____ day of May 1991.

_____

Tinder, Judge

United States District Court

_____

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BECKY CHAMBERS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP 88-1203C
	)	
AMERICAN TRANS AIR, Inc.	)	
	)	
	)	
Defendant.	)	

ENTRY REGARDING MOTION FOR ENLARGEMENT OF TIME IN WHICH TO RESPOND TO SUMMARY JUDGMENT, MOTION FOR LEAVE TO FILE RULE 56(f) AFFIDAVIT, AND PETITION FOR CLASS CERTIFICATION, MOTION TO STRIKE AFFIDAVIT, AND MOTION FOR SUMMARY JUDGMENT

I. Introduction

This cause comes before the court on several motions filed by plaintiff Becky Chambers and defendant American Trans Air, Inc. (ATA). This entry will address first the plaintiff's Motion For Enlargement Of Time In Which To Respond

To Summary Judgment and Motion For Leave To File Rule 56(f) Affidavit Out Of Time. The ruling on these two motions will set the course for the disposition of most of the other pending motions in this case.[3]

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[3] The only motion in this case that is not addressed in this entry is Defendant's Verified Motion And Supporting Memorandum Under Federal Rule Of Civil Procedure 11 And 28 U.S.C. § 1927. This court has taken this fully briefed motion under advisement as of June 2, 1989 and will rule on the motion in a subsequent entry.

II. Procedural Background

Plaintiff Chambers, who used to be an employee of defendant ATA, filed a complaint on October 11, 1988, against ATA alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e - 2000-17. On January 12, 1989, the defendant filed a Motion For Summary Judgment raising several arguments on which it based its request for judgment as a matter of law. One of the defendant's theories was that the plaintiffs' Title VII claims should fail because they were not the subject of a timely charge before the Equal Employment Opportunity Commission (EEOC). On January 27, 1989, the defendant filed a Petition For Enlargement Of Time requesting that this court allow the

plaintiff until February 29, 1989 to respond to the motion for summary judgment. This court granted the petition by signing the plaintiff's accompanying order. On March 1, 1989, the plaintiff filed a second Motion For Enlargement Of Time Within Which To Respond To Summary Judgment. The plaintiff requested an additional thirty days to respond to the timeliness issue and even more time to respond to the balance of the summary judgment motion upon completion of discovery of the plaintiff's individual claims. The defendant opposed the second motion for enlargement by arguing, in part, that the motion was filed late and did not state any reasons that would constitute "excusable neglect" under Federal Rule of Civil Procedure 6(b). Furthermore, the defendant argued that the plaintiff's

failure to obtain discovery was her own fault, that the motion for summary judgment was based, in part, on the plaintiff's own deposition testimony, and that she did not comply with Federal Rule of Civil Procedure 56(f) by failing to file an affidavit establishing the reasons why she could not present facts essential to her summary judgment response without additional discovery. Consequently, the plaintiff filed a Motion For Leave To File Rule 56(f) Affidavit Out Of Time. Counsel's affidavit was twenty pages in length with four exhibits attached. The defendant filed an opposition to the filing of the Rule 56(f) affidavit.

In ruling on the second motion for enlargement, this court acknowledged that February 29, 1989, was a nonexistent

date--the source of the confusion as to whether the plaintiff's second motion for enlargement filed on March 1, 1989, was timely. The court, however, granted the plaintiff thirty days from March 20, 1989, to file a response to the timeliness issue raised in the summary judgment motion. With respect to the rest of the issues raised in the summary judgment motion, this court took under advisement the motion for enlargement pending a decision on the timeliness issue. On May 8, 1991, this court issued its Entry Granting In Part And Denying In Part Defendant's Motion For Summary Judgment With Respect To Timeliness Issue. Because part of the plaintiff's discrimination claims survived the defendant's motion for summary judgment as to the timeliness issue, this court will now address the remaining motions.

This court has jurisdiction over this cause of action pursuant to 42 U.S.C. § 20003-59(f)(3).

III. Plaintiff's Motion For Enlargement Of Time Within Which To Respond To Summary Judgment and Motion For Leave To File Rule 56(f) Affidavit Out Of Time

A. Requirements of Federal Rule of Civil Procedure 6(b)

The defendant argues that this court should deny the plaintiff's second motion for enlargement because it does not meet the requirements of Federal Rule of Civil Procedure 6(b). That rule states, in part, as follows:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is

> made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . . .

Fed. R. Civ. P. 6(b). The defendant argues that the plaintiff's first enlargement extended the period for the filing of a response to the last day of February. Since February 29, 1989, did not exist, the last day of the time period should have been February 28, 1989. Not surprisingly, the plaintiff argues that March 1, 1989, was the last day of the enlargement period, which would mean that the second motion was timely filed.

As stated by the Entry dated March 20, 1989, attempting to analyze what I

meant, if anything, by signing the plaintiff's tendered order enlarging the time period to a nonexistent date would be fruitless. This court allowed the enlargement in order for the plaintiff to respond to the timeliness issue raised in the summary judgment motion without requiring the plaintiff to show excusable neglect, which assumes that the second enlargement was timely filed. Thus, with respect to the balance of the motion for enlargement, which was taken under advisement, this court also finds that it was timely filed, and the plaintiff has met the requirements of Federal Rule of Civil Procedure 6(b).

B. Requirements of Federal Rule of Civil Procedure 56(f)

The defendant next argues that the plaintiff's motion for enlargement did

not meet the requirements of Federal Rule of Civil Procedure 56(f), which provides as follows:

> Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f) (emphasis added). The plaintiff's second motion for enlargement, which did not have any affidavits attached as required by the rule, requested that this court extend the time period for a response to be filed to the summary judgment motion until after the plaintiff had completed discovery on the plaintiff's individual

claims. The motion stated that discovery requests served on the defendant on March 1, 1989 would more likely than not lead to information relevant to the issues raised in the motion for summary judgment. However, the motion stated that plaintiff's counsel had drafts of proposed discovery relating to Chambers's claims as of February 1, 1989. The motion states that "it is not reasonable to compel Plaintiff to resist summary judgment based on such information as Plaintiff has at this juncture." However, the motion also states that "Plaintiff stresses that Plaintiff now possesses substantial evidence which in Plaintiff's view should rebut the inferences and arguments in the Motion of Defendants for Summary Judgment . . . ."

This court also notes that this cause was filed on October 11, 1988, which afforded the plaintiff almost five months to conduct at least some discovery. Furthermore, the defendant's motion for summary judgment is based almost entirely on facts gleaned from Chambers's own complaint and deposition, not on facts that were only known to defendant.

After the defendant pointed out that the plaintiff's motion did not meet the requirements of Federal Rule of Civil Procedure 56(f), plaintiff's counsel filed a Motion For Leave To File Rule 56(f) Affidavit Out Of Time with a proffer that more closely resembled a responsive brief than an affidavit. The "affidavit" set forth "facts" corresponding to the numbered paragraphs

set forth in the defendant's Facts As To Which There Is No Genuine Issue And Proposed Conclusions Of Law that was submitted with the motion for summary judgment. The affidavit also included legal arguments and conclusions, including citations to cases.

In paragraph 14, plaintiff's counsel stated as follows:

> 14. I believe that the facts submitted in this affidavit should be sufficient by themselves to show summary judgment should be denied; however, there are facts which I do not yet have access too, or have been unable to present to the Court, which would bolster the evidentiary facts presented so far, and which justify holding the summary judgment motion in abeyance until the completion of discovery, as authorized by FRCP 56(f).

No where in the affidavit did plaintiff's counsel state why he could not present

"facts essential to justify . . . opposition" to the summary judgment motion within the applicable time period. Fed. R. Civ. P. 56(f). Indeed, as the defendant points out, the plaintiff, by counsel's affidavit, presents facts and legal arguments that the plaintiff believes are sufficient to withstand summary judgment. This undermines the plaintiff's assertion that she needs an enlargement of time to discover additional facts "essential" to her opposition of the summary judgment motion.

A party opposing a motion for summary judgment generally has two options: respond to the motion pursuant to Federal Rule of Civil Procedure 56(e) by setting forth facts that show a genuine issue for trial or file an

affidavit pursuant to Federal Rule of Civil Procedure 56(f) setting forth valid reasons why the party cannot present the necessary opposing facts. The purpose of Federal Rule of Civil Procedure 56(f) is to provide a safeguard against a premature grant of summary judgment. 10A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2740 (1983). While technical mistakes are generally overlooked by courts in applying the spirit of subdivision (f), liberal application of the rule does not help parties who have not complied with the rule because of their own lack of diligence. Id. at 532-35. "The most obvious indication of lack of diligence is a failure on the part of the nonmovant to present affidavits under either subdivision (e) or (f). In this situation the court may accept the facts

alleged in the movant's affidavits as true, and if they constitute a sufficient basis for summary judgment, the motion will be granted." Id. at 535; see also Adickes v. S. H. Kress & Co., 398 U.S. 144, 160-61 (1970) (dictum).

In Hebert v. Wicklund, 744 F.2d 218 (1st Cir. 1984), the First Circuit found that the district court acted within its discretion in ruling that an opposition to a summary judgment motion asking for further discovery time, an undocketed letter from counsel, and an untimely affidavit from a nonparty were not functional equivalents of a Rule 56(f) affidavit. The First Circuit distinguished a Fifth Circuit en banc decision in which that court of appeals found that a non-affidavit letter was sufficient under Federal Rule of Civil

Procedure 56(f). Littlejohn v. Shell Oil Co., 483 F.2d 1140, 1146 (5th Cir.) (en banc), cert. denied, 414 U.S. 1116 (1973). In Littlejohn, however, the letter had been docketed, was timely, and referred to the specific facts and the likely source of those facts that were needed to successfully oppose the motion for summary judgment.

The First Circuit revisited the issue of compliance with Federal Rule of Civil Procedure 56(f) in Paterson-Leitch Co. v. Massachusetts Mun. Wholesale Elec. Co., 840 F.2d 985 (1st Cir. 1988). In Paterson-Leitch, the court of appeals stated "substantial" rather than "hypertechnical compliance" would be sufficient for a party to obtain the benefits of Rule 56(f). Id. at 988. The First Circuit set forth the following

guidelines for a court to consider in determining whether a party has substantially complied with subdivision (f): (1) the alternative proffer should be written; (2) it should be timely, i.e., served with the response to the motion or filed at the earliest practicable date; (3) the statement, if not by affidavit, should be in some authoritative form, such as under penalty of perjury or subject to Federal Rule of Civil Procedure 11; (4) the proffer should articulate some plausible basis for the party's belief that certain discoverable material facts, which will be sufficient to raise a genuine dispute precluding summary judgment, exist that have not yet been obtained; (5) the party should show that such facts can be obtained within a reasonable period of time; and (6) the litigant must

demonstrate that good cause existed for failing to conduct the discovery earlier. Id.

The Seventh Circuit evaluated a motion for continuance and post-deadline submissions that were not in formal compliance with Federal Rule of Civil Procedure 56(f) in Pfeil v. Rogers, 757 F.2d 850 (7th Cir. 1985), cert. denied, 475 U.S. 1107 (1986). In Pfeil, the defendants moved for summary judgment after the parties had engaged in discovery. The plaintiff submitted two affidavits in response to the motion, and the defendant replied. The district court warned the parties that it would not consider any other evidence or arguments after the defendants filed their reply brief; however, the plaintiff did submit several affidavits and briefs

after the filing deadline. The plaintiff's own affidavit stated that the other affidavits contained information that was newly discovered evidence of which the plaintiff had no knowledge before the court's filing deadline. The district court refused to consider the materials submitted after the filing of the reply brief and granted summary judgment in favor of the defendants. On appeal, the Seventh Circuit cited to Littlejohn and stated that "[a] court may disregard a failure to formally comply with Rule 56(f) if the opposing party's request for a continuance clearly sets out the justification for the continuance." Pfeil, 757 F.2d at 856. Thus, the court found that the plaintiff's motion for a continuance, with attached affidavits that recited the justification for the continuance, was in

compliance with subdivision (f), even thought it was submitted after the filing deadline imposed by the district court and was incorrectly labeled a "Motion and Memoranda for Extension of Time to File affidavits Pursuant to Rules 59(c) and 60(b)." Id. at 854. However, the court went on to affirm the district court's denial of the motion for continuance because the plaintiff could have discovered the evidence earlier. The failure to secure the discoverable evidence was due to the plaintiff's own lack of diligence; thus, it was not an abuse of discretion for the district court to refuse the continuance for the plaintiff to obtain such information. Id. at 857.

In this case, Chambers filed a motion for continuance, signed by her

attorney, within the time period, but did not present a timely affidavit giving any reasons to show why she did not have essential evidence to contradict ATA's motion for summary judgment. In fact, the motion for enlargement admitted to the contrary that the plaintiff already possessed "substantial evidence" that would "rebut the inferences and arguments" raised in the summary judgment motion. See Otto v. Variable Annuity Life Ins., 814 F.2d 1127, 1138 (7th Cir. 1986) ("Rule 56(f) permits a party who has no specific evidence contradicting an opponent's motion for summary judgment to survive the motion by both presenting valid reasons for the lack of proof and showing how postponement of a ruling will enable the non-movant to rebut the movant's showing."), cert. denied, 486 U.S. 1026 (1988). Even the affidavit,

which the plaintiff seeks leave to file, admitted that plaintiff's counsel already knew facts as set forth in the affidavit that he believed were "sufficient by themselves to show summary judgment should be denied."

Furthermore, the plaintiff had a reasonable time--almost five months--within which to pursue discovery, at least with respect to Chambers's individual claims. During this time, it appears that plaintiff's counsel's attempts at discovery were limited. Cf. McTighe v. Mechanics Educ. Soc'y, 772 F.2d 210, 213 (6th Cir. 1985) (holding that summary judgment was not improper simply because discovery was incomplete when motion for summary judgment was filed two months after filing of lawsuit, court had ordered a five-month discovery

deadline, and nonmovant only attempted to pursue discovery after summary judgment was granted).

Plaintiff's counsel has tested the boundaries of compliance with procedural rules more than once in this cause of action. See Entry, April 7, 1989 (Judge Magistrate Godich's entry discussing compliance with Southern District of Indiana Local Rule 14(c)); Entry On Motion For Enlargement Of Time Within Which To Respond To Summary Judgment Motion, March 29, 1989 (Judge Tinder's entry discussing compliance with Federal Rule of Civil Procedure 6(b)). While this court does not want to exalt form over substance, it is necessary to strike a balance between requiring meticulous compliance with the rules, which may result in harsh results for litigants,

versus allowing, and thus encouraging, sloppy lawyering, which needlessly saps the strength and time of the judiciary as well as that of the opposing party.

To this end, this court holds that the plaintiff and her counsel, by affidavit--even assuming that it was timely filed--have not sufficiently stated their reasons for needing additional discovery in order to oppose the defendant's motion for summary judgment. To the contrary, the plaintiff has stated that she has "substantial evidence" that "should rebut" the defendant's motion. Indeed, plaintiff's counsel sets forth in detail such evidence in his affidavit, of which he seeks leave to file. Thus, the plaintiff does not show that she believes that she needs a continuance to discover

"essential facts" that are necessary to her response. Furthermore, the plaintiff does not explain why she did not or could not obtain such facts through discovery during the almost five months before her second motion for enlargement was filed. In other words, the plaintiff proffered no good cause for her failure to have conducted such discovery earlier. Thus, to the extent that the plaintiff requests a continuance to conduct discovery in order to respond to the motion for summary, this request is DENIED. However, this court GRANTS the plaintiff's Motion For Leave To File Rule 56(f) Affidavit Out Of Time and will treat the "affidavit" as a response to the defendant's motion for summary judgment. While the facts of another case may require this court to strike the balance between form and substance

differently, the above holding in this case allows this court to consider the arguments that the plaintiff, by counsel, raises in the affidavit, while not encouraging cavalier disregard of the procedural rules, which are intended to provide for an orderly and fair proceeding.[4]

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[4] It should be noted that this court could have issued a ruling on the motion for summary judgment without the benefit of the plaintiff's untimely response. The local rule that sets forth the time schedule for briefing a summary judgment motion states that "[f]ailure to file an answer brief or reply brief within the time prescribed shall subject the motion to summary ruling." S.D. Ind. R. 9(a). With regard to determining whether material facts are controverted, the local rules provide, in part, as follows:

> In determining the motion for summary judgment, the court will assume that the facts as claimed by the moving party are admitted to exist without controversy, except as and to the extent that such facts are actually in good faith controverted in the "statement
>
> (continued...)

'(...continued)
of genuine issues" filed in opposition to the motion, as supported by the depositions, answers to interrogatories, admissions, and affidavits on file.

S.D. Ind. R. 11.

These local rules, however, must be juxtaposed against the backdrop of Federal of Civil Procedure 56, which provides, in part, as follows:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, <u>if appropriate</u>, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e) (emphasis added). Thus, this court may not automatically

(continued...)

IV. Motion for Summary Judgment

Chambers's alleges that she was discriminated against by ATA in violation of Title VII with respect to her wages, discharge and promotions. The defendant filed a motion for summary judgment

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'(...continued)
grant summary judgment in favor of a movant because the opposing party has failed to respond; rather, I would first determine whether summary judgment is "appropriate." To the extent that the moving party had the burden of proof on any of the relevant issues, then this court would have to determine whether "the facts specified in or in connection with the motion entitle the moving party to judgment as matter of law." To the extent that the moving party did not have the burden of proof on any of the relevant issues, then this court would determine whether "the deficiencies in the opponent's evidence designated in or in connection with the motion entitle the moving party to judgment as a matter of law." Anchorage Assocs. v. Virgin Islands Bd. of Tax Rev., 922 F.2d 168, 175 (3rd Cir. 1990); see also Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

raising several arguments. One of the arguments was that Chambers's employment discrimination claims should fail because they were not made the subject of a timely EEOC charge. This issue was fully briefed by the parties and ruled upon by this court in an entry dated May 8, 1991. The court held that the plaintiff's failure-to-promote claim and discriminatory wage claim based upon acts that occurred in 1983 were time-barred. The court also held that any claims that the plaintiff may have tried to assert regarding allegations of harsher discipline, heavier work loads and overt hostility from supervisors were also time-barred. This left the plaintiff with the following claims: 1) a constructive discharge claim; 2) two wage discrimination claims--in August 1986 when Chambers went from a Crew Planner in

Training to Crew Planner; and in November-December 1986 when she acted as "senior" Crew Planner and when Lon Lett left around Christmas 1986; and 3) one promotion claim--on March 20, 1987, when Lett was made supervisor in Crew Planning. These claims will now be analyzed in light of the remaining arguments raised in the summary judgment motion.

A. Standard of Review

Summary judgment, pursuant to Federal Rule of Civil Procedure 56, is properly granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In making this determination, this court views the record in the light most favorable to the

party opposing the motion. See Morgan v. Harris Trust & Sav. Bank, 867 F.2d 1023, 1026 (7th Cir. 1989) (per curiam). The moving party has the initial burden of demonstrating that absence of a genuine issue of material fact. Celotex Corp., 477 U.S. at 323. The non-moving party must then "set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56(e)). "[A]t the summary judgment stage the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249. A court must enter summary judgment against the non-moving party if, after adequate time for discovery, the party "fails to make a showing sufficient to establish the

existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 322-23. Furthermore, a factual dispute must be outcome determinative to preclude summary judgment. Donald v. Polk County, 836 F.2d 376, 379 (7th Cir. 1988). Thus, the mere assertion of a factual dispute cannot defeat the motion for summary judgment. Anderson, 477 U.S. 242.

Summary judgment is frequently not an appropriate resolution in a Title VII case. See Holland v. Jefferson Nat'l

Life Ins. Co., 883 F.2d 1307, 1312 (7th Cir. 1989); Powers v. Dole, 782 F.2d 689, 694 (7th Cir. 1986). However, summary judgment is not automatically inappropriate simply because issues of discriminatory motive or intent are raised. See Holland, 883 F.2d at 1312. As the Seventh Circuit has counselled, this court must approach a question of summary judgment in a discrimination case with special caution. Id. at 1313.

B. Promotion Claim

The defendant argues that the plaintiff's remaining promotion claim should be barred because it was not made the subject of any EEOC charge. The plaintiff argues that her EEOC charge, which alleged that she and other women were paid less than men who had

comparable responsibility[5], was sufficient to encompass her charge of discriminatory promotions because such discriminatory promotion decisions in favor of men over women "is one vehicle by which such unequality in pay is realized."

The filing of charges with the EEOC and the receipt of a right to sue letter are necessary prerequisites to pursuing any Title VII claim in federal district court. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Movement for Opportunity & Equality v. General Motors Corp., 622 F.2d 1235, 1238 (7th Cir.

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[5] Chambers's EEOC charge stated, in part, that "[w]itnesses formerly in management will confirm chauvinism at the highest levels of the company, and a pattern of paying women less money for comparable positions or responsibility. This is true both on lower levels and in management."

1980). The nature of the charge before the EEOC affects the permissible scope of the complaint. "Allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would circumvent the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge . . . ." Babrocky v. Jewel Food Co. & Retail Meatcutters Union, 773 F.2d 857, 863 (7th Cir. 1985). The only claims that are cognizable are those in the EEOC charge and those that are "'like or reasonably related to the allegations of the charge and growing out of such allegations.'" Id. at 864 (quoting Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 167 (7th Cir.) (en banc), cert denied, 429 U.S. 986 (1976)); see also Schnellbaecher v. Baskin Clothing Co., 887 F.2d 124, 127 (7th Cir. 1989); Gamble v. Birmingham S.

R.R. Co., 514 F.2d 678, 687-89 (5th Cir. 1975); Flesch v. Eastern Pennsylvania Psychiatric Inst., 434 F. Supp. 963, 970 (E.D. Pa. 1977). Thus, while the extent of an EEOC investigation may help define the scope of the charge, it will not necessarily defeat a complaint where the complaint contains allegations that are like or reasonably related to the EEOC charge. Schnellbaecher, 887 F.2d at 127.

The plaintiff's EEOC charge complains that ATA pays "women less [than men] for comparable positions or responsibility." While the language in the EEOC charge and the subsequent court complaint need not be identical, this court finds the plaintiff's focus in her EEOC charge is directed at the discrimination in wages between males and females who have similar positions or

responsibilities. She does not allege any facts that would cause the EEOC to investigate possible discrimination in Chambers's promotional opportunities. See Babrocky, 773 F.2d at 864 n.2 (noting that the proper inquiry to determine what is like or reasonably related to the EEOC charge is what EEOC investigation could reasonably be expected to grow from the original charge). Thus, this court holds that the plaintiff's remaining promotion claim is barred because it was not raised in the EEOC charge.

C. Constructive Discharge Claim

The plaintiff submitted a letter of resignation to her supervisor in which she expressed her intent to resign unless her salary was increased $500.00 per year more than "the currently highest (and newest) Crew Planner" and one or two more

full time FA Planners were hired. The letter sets forth the factors that prompted her resignation: part time temporary employees were incompetent; management was not unresponsive to complaints; work load was unbalanced; part time help took days off during the busiest times; previously promised help was not received; a verbal warning to the entire group should have been done on an individual basis; and conflicts in scheduling existed. On July 8, 1987, ATA accepted Chambers's resignation, and this was the last day that she worked for ATA. The plaintiff argues that her "resignation" was really a constructive discharge for which she should be compensated.

In order for the plaintiff to state a constructive discharge claim, she must

establish that the working conditions were so intolerable that a reasonable person would have been compelled to resign. See Henn v. National Geographic Soc'y, 819 F.2d 824 (7th Cir.), cert. denied, 484 U.S. 964 (1987); Martin v. Citibank, 762 F.2d 212 (2d Cir. 1985). Even if working conditions are discriminatory, they may not be sufficient to support a constructive discharge claim. Geisler v. Folsom, 735 F.2d 991, 996 (6th Cir. 1984); Miller v. Illinois, 681 F. Supp. 538, 544 (N.D. Ill. 1988). Even accepting as true the plaintiff's reasons for her resignation cited in her letter, this court finds as a matter of law that the plaintiff has not established that the working conditions of which she complained of in her letter were so intolerable as to have forced a reasonable person to have quit.

Compare Henn, 819 F.2d 824 (resignation due to "silent treatment" by employer and threat not constructive discharge as matter of law); Bourque v. Powell Elec. Mfg., 617 F.2d 61 (5th Cir. 1980) (resignation due to lower pay resulting from sex discrimination not constructive discharge); Miller, 681 F. Supp. 538 (resignation due to "harassing" telephone calls, undercutting plaintiff's effectiveness, not authorizing motor pool car, etc. not constructive discharge as a matter of law) with Goss v. Exxon Office Sys. Co., 747 F.2d 885 (3d Cir. 1984) (sufficient for constructive discharge that plaintiff was verbally abused and threatened and forcibly transferred to a lower position as the result of sex and pregnancy discrimination); Meyer v. Brown & Root Constr. Co., 661 F.2d 369 (5th Cir. 1981) (constructive discharge found

when pregnant employee was involuntarily transferred to heavy manual labor that posed substantial risks to her health).

D. Wage Discrimination Claims

The plaintiff has two wage discrimination claims that were timely filed. Chambers alleges that in August 1986 when she was promoted from Crew Planner in Training to Crew Planner that she should have received a salary increase. Chambers also alleges that in November-December 1986 when she acted as "senior"[6] Crew Planner and when Lon Lett left around Christmas 1986 that she should have received a salary increase.

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[6] Chambers acknowledges in her deposition that there is no formal position or title as "senior" Crew Planner.

In order for Chambers to survive summary judgment on her Title VII wage discrimination claims, she must show that but for the fact that she is female, she would have received salary increases. The burden is on the plaintiff to prove discriminatory motive and intent by her employer. This showing may be made either by direct proof of discriminatory intent or by the method of indirect proof as set forth in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981) and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). See Lynch v. Belden & Co., 882 F.2d 262, 268 (7th Cir. 1989), cert. denied, 110 S. Ct. 1134 (1990). Direct evidence of a discriminatory motive consists of actions or remarks by the defendant that reflect a discriminatory attitude in the employment decision-

making process. See Crader v. Concordia College, 724 F. Supp. 558, 564-65 (N.D. Ill. 1989). The indirect method of proof as outlined in Burdine and McDonnell Douglas Corp. allows a plaintiff to raise an inference of discriminatory intent when there is no direct evidence available. See Lynch, 882 F.2d at 269. Under this indirect method, the plaintiff first has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Burdine, 450 U.S. at 252-53. If the plaintiff succeeds in proving the prima facie case, a rebuttable presumption arises, and the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its employment action. Id.; McDonnell Douglas Corp., 411 U.S. at 802. Should the defendant carry this burden, the

presumption raised by the prima facie case is rebutted. Burdine, 450 U.S. at 255. The plaintiff must then prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were merely a pretext for discrimination. Id. at 252-53; see also Reeder-Baker v. Lincoln Nat'l Corp., 834 F.2d 1373, 1376-77 (7th Cir. 1987); Collins v. Illinois, 830 F.2d 692, 698 (7th Cir. 1987).

The record in this case fails to reveal any direct evidence of discrimination on the basis of sex regarding the plaintiff's salary level. Thus, Chambers can prevail only by utilizing the McDonnell Douglas Corp.--Burdine method of indirect proof. In this case, however, the plaintiff testified in her deposition in that she

had no reason to believe that she failed to receive any wage increases because of her sex.[7] The plaintiff points to other portions of her deposition in which she supposedly sets forth evidence regarding discriminatory practices by the defendant.[8] However, the cited deposition testimony either does not address the two promotion claims at issue here or it is insufficient for the

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[7] For example, the plaintiff testified as follows:

> Q. Do you have any reason to believe that you did not get these three raises you talked to us about because of your sex?
> A. I don't know.
> Q. Do you have any facts or evidence that would indicate that you didn't get these three raises because of your sex?
> A. No.

[8] See page 6 of Affidavit Of Gordon B. Dempsey on which plaintiff's counsel sets forth numerous citations to the plaintiff's deposition.

plaintiff to establish by a preponderance of the evidence that she was not granted a wage increase because of her sex, especially in light of her admission that sex was not a factor in whether she received wage increases in 1986.[9] Furthermore, Chambers testified that she never requested raises during the time in question nor did she complain to ATA Personnel of sex discrimination with regard to her wages in 1986 or when she resigned. The plaintiff has failed to make a prima facie case regarding her discriminatory wage claims; thus, these claims fail on the merits.

V. Conclusion

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[9] This court notes that the plaintiff did receive a wage increase in October 1986 from $17,000.00 to $19,000.00.

Based upon the reasons given above, this court holds that the plaintiff's promotion claim is barred because it was not included in the Chambers's EEOC charge, her destructive discharge claim is barred because a reasonable person would not have been compelled to resign based upon Chambers's working conditions, and her two wage discrimination claims fail on the merits. All of Chambers's other claims were barred as untimely in a previous entry dated May 8, 1991. Thus, this court will GRANT the defendant's motion for summary judgment and will enter judgment in favor of the defendant in an accompanying order.[10]

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[10] In light of the ruling on the motion for summary judgment, this court DENIES as moot the plaintiff's Petition For Class Certification and the defendant's Motion To Strike Affidavit.

Dated this _____ day of May

1991.

_____

John Daniel Tinder, Judge
United States District Court

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BECKY CHAMBERS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP 88-1203-C
	)	
AMERICAN TRANS AIR, INC.,	)	
	)	
Defendant.		

SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

This court, having this day issued its Entry Regarding Motion for Enlargement of Time in Which to Respond to Summary Judgment, Motion for Leave to File Rule 56(f) Affidavit Out of Time, Petition for Class Certification, Motion to Strike Affidavit, And Motion for Summary Judgment in the above-captioned cause of action, now therefore, in acordance therewith,

ORDERS AND DECREES that plaintiff Becky Chambers takes nothing by way of her complaint and judgment is entered in favor of defendant American Trans Air, Inc., and against plaintiff Becky Chambers.

All of which is ordered this 23rd day of May, 1994.

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John Daniel Tinder, Judge
United States District Court

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BECKY CHAMBERS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP 88-1203-C
	)	
AMERICAN TRANS AIR, INC.,	)	
	)	
Defendant.		

ENTRY DISCUSSING DEFENDANT'S MOTION FOR SANCTIONS AND PLAINTIFF'S RULE 60(B) MOTION AND/OR MOTION TO ALTER OR AMEND JUDGMENT

On October 11, 1988, Becky Chambers filed a complaint against American Trans Air, Inc. ("ATA") alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. Ms. Chambers' complaint alleged that ATA discriminated against her on the basis of sex "with respect to compensation, terms, conditions, privileges and opportunities

of employment" and that this resulted in a constructive discharge. Ms. Chambers also filed a Petition to Certify Action as Class Action with a supporting brief. ATA responded that the petition did not meet any of the prerequisites for the certification of a class action under Rule 23 of the Federal Rules of Civil Procedure. ATA also moved for summary judgment arguing that Ms. Chambers' claims of discrimination were barred. This court granted partial summary judgment in favor of ATA on May 8, 1991, and granted summary judgment in favor of ATA as to the remaining issues on May 23, 1991.

On March 21, 1989, ATA motioned for sanctions against Ms. Chamber's counsel, Gordon Dempsey, seeking the reasonable expenses, including attorney's fees,

incurred by ATA because of the filing and pursuit of certain claims and pleadings pursuant to Rule 11 of the Federal Rules of Civil Procedure and/or 28 U.S.C. § 1927. The motion was taken under advisement as of June 2, 1989; the court will now consider that motion.

The court will initially address Ms. Chamber's motions for relief from the judgment entered against her on May 8, 1991 under Rule 60(b) of the Federal Rules of Civil Procedure, and for a new trial and/or to alter or amend the summary judgment entered against her on May 23, 1991 pursuant Rule 59 of the Federal Rules of Civil Procedure, which were filed on June 7, 1991.

Ms. Chamber's Rule 60(b) Motion for Relief from Judgment

Ms. Chambers alleges that there are several errors in the court's judgment in favor of ATA on May 8, 1991. In that ruling, the court held that Ms. Chambers' claims of discriminatory denial of promotion and pay increase in 1983 and claims of harsher discipline, heavier work loads, and hostility from her supervisor were time-barred. Ms. Chambers requests the court to set aside that judgment under Rule 60(b) of the Federal Rules of Civil Procedure.[11]

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[11] Rule 60(b) provides that the court may relieve a party from a final judgment for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment

(continued...)

"Relief from a judgment under Rule 60(b) is an extraordinary remedy and is granted only in exceptional circumstances." Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat, 902 F.2d 1275, 1277 (7th Cir. 1990); United States v. One 1979 Rolls-Royce Corniche Convertible, 770 F.2d 713, 716 (7th Cir. 1985); Wilson v. Studebaker-Worthington, Inc., 699 F. Supp. 711, 715 (S.D. Ind. 1987). Whether to grant relief under Rule 60(b) is addressed to the sound discretion of the district court. Williams v. Hatcher, 890 F.2d 993, 995 (7th Cir. 1989); One 1979 Rolls-Royce Corniche Convertible, 770 F.2d at 716.

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[11](...continued)
should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. Ms. Chambers' motion fails to specify under which subsection she is proceeding.

Ms. Chambers takes issue with the court's statement that class certification is inappropriate where the plaintiff's individual claims cannot survive a summary judgment motion. It is well settled that a class action should be dismissed if the class representative's individual claims are found to be without merit prior to certification of the class. See East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403 (1977); Walker v. Jim Dandy Co., 747 F.2d 1360, 1364-65 (11th Cir. 1984); Everitt v. City of Marshall, 703 F.2d 207, 210 (5th Cir.), cert. denied, 464 U.S. 894 (1983).

Ms. Chambers' complaint alleged that she was discriminated against with respect to "compensation, terms, conditions, privileges and opportunities

of employment" and that she was constructively discharged. In her deposition, Ms. Chambers testified that the allegation of discrimination referred only to promotions. Ms. Chambers challenged two promotion decisions, which occurred in 1983 and 1987. In finding that Ms. Chambers was barred from challenging the 1983 decision because it was not timely filed with the Equal Employment Opportunity Commission (EEOC), see 42 U.S.C. § 2000e-5(e),[12] the court

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[12] Under 42 U.S.C. § 2000e-5(e), the claimant must file a Title VII claim with the EEOC within 180 days of the occurrence of the alleged unlawful employment practice. However, if the claimant initially institutes a proceeding with a state or local agency that possesses the authority to grant or seek relief from the alleged discrimination, the time limit for filing with the EEOC is extended to 300 days after the discriminatory act. Ms. Chambers filed her charge with the EEOC on January 5, 1988; thus, any claim for acts occurring prior to March 18, 1987 fall outside the 300-day period.

determined that the "continuing violation" exception did not apply. See United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977) (holding that present effects of past discriminatory acts occurring outside the EEOC filing period could not be the basis for recovery under Title VII; dispositive inquiry is whether present violation exists); Stewart v. CPC Int'l, Inc., 679 F.2d 117, 120-21 (7th Cir. 1982) (noting that "[a]t least one discriminatory act must have occurred within the charge-filing period" and that prior discriminatory acts are not relevant unless the plaintiff can show that the discrimination is "presently" continuing).

The court considered Ms. Chambers' allegations that she was discriminated against with respect to her wages,

discharge and promotions to determine whether she had sufficiently alleged a continuing violation or had otherwise met the 300-day filing requirement. In her Rule 60(b) motion, Ms. Chambers asserts that the court erred in determining that the "continuing violation" exception did not apply to the alleged discriminatory acts which occurred in 1983. She asserts that the discriminatory practices which occurred at that time and within the 300-day period "suggest an ongoing pattern to be flushed out through discovery." Ms. Chambers admits, however, that as individual events, the 1983 claims of failure to promote or grant a raise might be time-barred.

Upon review of the judgment, the court finds that it correctly applied the criteria used to determine whether

discriminatory conduct constitutes a continuing violation. With regard to Ms. Chambers' 1983 failure to promote and wage discrimination claim, the court found that Ms. Chambers had failed to show that the lack of a raise in 1983 was connected to the alleged pattern of discrimination in 1986. The court found that there was no indication that the person who decided whether to give Ms. Chambers a raise in 1983 was also the person who made such decisions in 1986, and that any discrimination which occurred when Ms. Chambers was employed as Contract Supervisor in 1983 ceased when she was demoted back to her previous position after 90 days. Ms. Chambers' mere assertion that the alleged discrimination in 1983 is connected to the alleged discrimination which occurred

in 1986 is insufficient to support her motion for relief from judgment.

The court also found that Ms. Chambers' claims of heavier workloads, harsher discipline, and overt hostility from her supervisor were time-barred because they were not raised in her EEOC charge or complaint. See Schnellbaecher v. Baskin Clothing Co., 887 F.2d 124, 127 (7th Cir. 1989); Babrocky v. Jewel Food Co. & Retail Meatcutters Union, 773 F.2d 857, 863 (7th Cir. 1985).

Ms. Chambers correctly cites Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970) for the proposition that a judicial complaint is limited not by the charge but by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination. The "scope of the

charge" doctrine allows a plaintiff to make allegations in her complaint that may not have been specifically alleged in the EEOC charge but which reasonably could have grown out of an investigation of that charge. Ms. Chambers asserts that the EEOC charge suggested claims of harsher discipline, heavier work loads, and overt hostility, and that those conditions could have been observed in the EEOC investigation. Even so, however, the scope of the charge doctrine is not applicable to this case because Ms. Chambers did not allege these claims in her complaint. The claims were first raised in Ms. Chambers' reply to ATA's motion for summary judgment.

Ms. Chambers submits that her complaint sets forth these claims. Paragraph 8 of the complaint states that:

> Plaintiff was discriminated against by Defendant with respect to compensation, terms, conditions, privileges and opportunities of employment and has been subject to those illegal acts, practices and conduct alleged in Paragraph 11 of the Complaint.

Paragraph 11 states in relevant part that:

> Plaintiff was required by Defendant to check the work of males she had trained and, despite the comparable or greater responsibility of her position, Defendant paid her less than the males whose work she reviewed.

As the court noted, during her deposition, Ms. Chambers stated that the phrase "with respect to compensation, terms, conditions, privileges and opportunities of employment" related to compensation and promotion. Paragraph 11 also states facts related to Ms. Chambers' discriminatory wage and promotion claims.

Ms. Chambers also points to Paragraphs 12 and 13. Paragraph 12 states that "Defendant has exhibited chauvinism at the highest levels in the company." Paragraph 13 provides that:

> Defendant has demonstrated its discriminating attitude toward its female employees in that females, including those in management, were routinely referred to in vulgar sexist language in their absence, by the highest levels of management.

Neither of these allegations states claims that Ms. Chambers was subjected to harsher discipline, given heavier work loads, or subjected to overt hostility by her female supervisor.

The court properly granted summary judgment in favor of ATA with regard to Ms. Chambers' failure to promote and discriminatory wage claims based on acts which occurred in 1983, and her

allegations of harsher discipline, heavier work loads, and overt hostility because the claims were time-barred. Therefore, Ms. Chambers' 60(b) motion for relief will be DENIED.[13]

Ms. Chamber's Rule 59 Motion for a New Trial and/or to Alter or Amend Judgment

Ms. Chambers seeks relief form the court's May 23, 1991 ruling under Rule 59(a) and (e) of the Federal Rules of Civil Procedure. Specifically, she seeks relief from: (1) the denial of her Motion for Enlargement of Time within which to

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[13] Ms. Chambers requests the court, in the alternative, to permit completion of discovery and a trial or reverse, alter, or amend the May 8, 1991 judgment under Rule 59 of the Federal Rules of Civil Procedure. However, she failed to present any argument or authority for such relief; therefore, the court will not consider Ms. Chambers' request for relief under Rule 59 with regard to that judgment.

Respond to Summary Judgment in which she requested time to conduct additional discovery; (2) rulings that (a) her promotion claim is time-barred, (b) her constructive discharge claim is insufficient as a matter of law, and (c) she failed to establish a prima facie case regarding her discriminatory wage claims; and (3) the ruling that her Petition for Class Certification is moot.

A motion for a new trial or an amendment or alteration of judgment is made under Rule 59 of the Federal Rules of Civil Procedure. In determining whether a new trial is warranted under Rule 59(a), the district court must decide whether the trial was unfair to the moving party. Forrester v. White, 846 F.2d 29, 31 (7th Cir. 1988); Davis v. FMC Corp., 771 F.2d 224, 232-33 (7th Cir.

1985). Whether to grant a new trial is within the discretion of the district court. Id.; Roggow v. Mineral Processing Corp., 894 F.2d 246, 249 (7th Cir. 1990).

A motion to amend or alter a final judgment under Rule 59(e) cannot be used to raise arguments which could, and should have been made before the district court entered the final judgment. Woods v. Michigan City, Indiana, 940 F.2d 275, 280 (7th Cir. 1991) (citation omitted). Whether to grant or deny a Rule 59(e) motion is within the district court's discretion. See id.

After filing its motion for summary judgment, ATA filed a Petition for Enlargement of Time requesting that the court allow Ms. Chambers additional time to respond to the motion for summary judgment. The court granted the

petition. Ms. Chambers subsequently filed a Motion for Enlargement of Time within which to respond to summary judgment. In that motion, Ms. Chambers requested an additional thirty days to respond to the timeliness issue and time to respond to the balance of the summary judgment motion upon completion of discovery of her individual claims.

ATA opposed the motion and argued that Ms. Chambers' failure to obtain discovery was her own fault, that the motion was based, in part, on Ms. Chambers' own deposition testimony, and that she did not comply with Rule 56(f) of the Federal Rules of Civil Procedure by filing an affidavit establishing why she could not present facts essential to her summary judgment response without additional discovery. Ms. Chambers then

filed a Motion for Leave to File Rule 56(f) Affidavit Out of Time.

The court found that Ms. Chambers' motion for enlargement was timely, but that it did not meet the requirements of Rule 56(f). "Rule 56(f) permits a party who has no specific evidence contradicting an opponent's motion for summary judgment to survive the motion by both presenting valid reasons for the lack of proof and showing how postponement of a ruling will enable the non-movant to rebut the movant's showing." Otto v. Variable Annuity Life Ins., 814 F.2d 1127, 1138 (7th Cir. 1986), cert. denied, 486 U.S. 1026 (1988). Therefore, under Rule 56(f), Ms. Chambers was required to file an affidavit establishing the reasons why she could not present facts essential to

her summary judgment response without additional discovery.

Ms. Chambers' subsequent Rule 56(f) affidavit failed to state why she could not present facts essential to oppose ATA's summary judgment motion within the applicable time period. In fact, the affidavit stated that the facts in the affidavit "should be sufficient by themselves to show summary judgment should be denied," and Ms. Chambers' motion for enlargement of time asserted that she already possessed substantial evidence that would rebut the inferences and arguments raised in ATA's summary judgment motion. As this court noted in the May 23, 1991 entry, these statements undermined Ms. Chambers' need for an enlargement of time to discover additional facts essential to her

opposition of the summary judgment motion.

The court also noted that Ms. Chambers had five months to conduct some discovery after the cause was filed, and that ATA's motion for summary judgment was based almost entirely on facts gleaned from Ms. Chambers' complaint and deposition.

The court did not abuse its discretion in denying Ms. Chambers' motion for enlargement of time because she had proffered no good cause for her failure to have conducted discovery earlier. See Otto, 814 F.2d at 1138 (district court did not abuse its discretion in refusing to grant continuance for additional discovery where plaintiff failed to adequately explain why she could not respond to

defendant's motion for summary judgment); Pfeil v. Rogers, 757 F.2d 850, 856-57 (7th Cir. 1985) (no abuse of discretion where continuance was denied because party failed to secure discoverable evidence due to his own lack of diligence), cert. denied, 475 U.S. 1107 (1986).

The court dismissed Ms. Chambers' remaining promotion claim because she had failed to raise the claim in her EEOC charge. See Babrocky, 773 F.2d at 863. Ms. Chambers' EEOC charge complained that ATA pays "women less [than men] for comparable positions or responsibility." The court found that the plain focus of that charge was directed at the discrimination in wages between males and females who have similar positions or responsibilities, and that the charge did

not allege any facts that would cause the EEOC to investigate possible discrimination in Ms. Chambers' promotional opportunities. See id. at 864 n.2 (noting that the proper inquiry is into what EEOC investigation could reasonably be expected to grow from the charge). The court properly dismissed the promotion claim on the basis that the EEOC charge did not allege facts to suggest that Ms. Chambers had been denied a promotion.

Ms. Chambers submitted a letter of resignation to her supervisor in which she expressed her intent to resign unless her salary was increased. The letter set forth the factors which prompted her resignation: part time temporary employees were incompetent; management was unresponsive to complaints; work load

was unbalanced; part time help took days off during the busiest times; previously promised help was not received; a verbal warning to the entire group should have been done on an individual basis; and conflicts in scheduling existed. According to Ms. Chambers' complaint, ATA "refused to refrain from said illegal acts, practices and conduct" and so she was "compelled to resign her position at [ATA], or was terminated."

"An employer constructively discharges an employee only if it makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." Henn v. National Geographic Society, 819 F.2d 824, 829 (7th Cir.) (citation omitted), cert. denied, 484 U.S. 964 (1987). The court accepted Ms. Chambers' allegations

as true but found them to be insufficient as a matter of law to constitute a constructive discharge. See Goss v. Exxon Office Systems, Co., 747 F.2d 885, 888 (3d Cir. 1984); Meyer v. Brown & Root Constr. Co., 661 F.2d 369, 372 (5th Cir. 1981).

In her Rule 59 motion, Ms. Chambers merely states that her supervisor deliberately made things difficult for her in such a way as to make her resignation letter inevitable. The court properly dismissed the constructive discharge claim.

With regard to her claims of wage discrimination, Ms. Chambers admitted in her deposition that she had no reason to believe that she failed to receive any wage increases because of her sex. The court also noted that Ms. Chambers

testified that she never requested raises during the time in question nor did she complain to ATA personnel of sex discrimination with regard to her wages. Therefore, Ms. Chambers failed to establish a prima facie case of wage discrimination. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnel Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

Ms. Chambers also contends that her Petition for Class Certification is not moot. As the court noted, a class action should be dismissed if the class representative's individual claims are found to be without merit prior to certification of the class. Rodriguez, 431 U.S. at 403; Walker, 747 F.2d at 1364-65; Everitt, 703 F.2d at 210. The court's ruling in this regard was proper.

For the foregoing reasons, the court will deny Ms. Chambers' motions for relief under Rules 60(b) and 59.

ATA's Motion for Sanctions

Federal Rule 11 prohibits the filing of pleadings that are not reasonably based in the law or in fact and forbids the filing of pleadings that are interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increased cost of litigation. Burda v. M. Ecker Co., 954 F.2d 434, 439 (7th Cir. 1992). In signing a pleading, the attorney certifies that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose. FED. R. CIV. PRO. 11; Cooter & Gell v.

Hartmarx Corp., 496 U.S. 384, 393 (1990). "An attorney who signs [a pleading] without such a substantiated belief shall be penalized by an appropriate sanction. Such a sanction may, but need not, include payment of the other parties' expenses." Id. An attorney who multiplies proceedings in a case unreasonably or vexatiously may be sanctioned under 28 U.S.C. § 1927. See Suslick v. Rothschild Securities Corp., 741 F.2d 1000, 1006 (7th Cir. 1984) (liability under § 1927 requires subjective bad faith by the attorney).

If the court finds that a pleading was not grounded in fact or warranted by existing law, or was meant to harass, the court must impose a sanction under Rule 11. Thompson v. Duke, 940 F.2d 192, 195 (7th Cir. 1991); Brown v. Federation of

State Medical Boards of the United States, 830 F.2d 1429, 1433 (7th Cir. 1987). The standard for imposing sanctions under Rule 11 is an objective determination of whether the attorney's conduct was reasonable under the circumstances. Id. at 1435; In re Ronco, Inc., 838 F.2d 212, 217 (7th Cir. 1988). Under Rule 11, an attorney is required to make a reasonable inquiry into the factual and legal basis for the claims asserted. Id. To determine whether reasonable inquiry has been made, the factors to be considered include: (1) the amount of time the attorney had for investigation, research of the relevant law and preparation of the document; (2) whether the document contains a plausible view of the law; (3) the complexity of the facts and legal issues involved; and (4) whether the document was a good faith

effort to extend or modify the existing law. Brown, 830 F.2d at 1435; Blossom v. Blackhawk Datsun, Inc., 120 F.R.D. 91, 99-100 (S.D. Ind. 1988). It is not permissible to file suit and use discovery as the sole means of determining whether the case has merit; discovery is used to fill in the details. Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987), cert. dismissed, 485 U.S. 901 (1988).

Misrepresentations by counsel as to either the facts or the law are also sanctionable. See Tuf-Flex Glass v. N.L.R.B., 715 F.2d 291, 298 (7th Cir. 1983) (factual misrepresentation can form the basis for a punitive award where misrepresentation is responsible for preserving an otherwise meritless suit);

McCandless v. Great Atlantic & Pacific Tea Co., Inc., 697 F.2d 198, 202 (7th Cir. 1983) (deliberate misquote of a case) (quoting Quality Molding Co. v. American National Fire Ins. Co., 287 F.2d 313, 316 (7th Cir.), cert. denied, 368 U.S. 826 (1961)).

A. Claim for Liquidated and Exemplary Damages

ATA maintains that Mr. Dempsey engaged in sanctionable conduct by seeking liquidated and exemplary damages in the complaint because such damages are not recoverable under Title VII and by failing to dismiss the claim for those damages after being put on notice by ATA.

The complaint seeks liquidated and exemplary damages for humiliation and distress. ATA denied that Ms. Chambers

is entitled to such damages in answering the complaint, and subsequently wrote a letter to Mr. Dempsey advising him that the damages are not recoverable under Title VII. The letter also stated that sanctions might be sought under Rule 11 against Mr. Dempsey if he persisted in pursuing the claim for such damages.

Mr. Dempsey contacted ATA's counsel when he received the letter, but they were unable to agree on the matter. ATA then filed a Motion to Strike the claim for liquidated and exemplary damages. After petitioning for an enlargement of time to respond, Mr. Dempsey responded by noting the types of cases in which such damages are available. He acknowledged that the damages are not recoverable in a Title VII action, but stated that the claim for the damages was "included by

drafting oversight and should be deleted."

Mr. Dempsey responds to ATA's motion for sanctions by stating that his drafting oversight arose because he failed to focus on an "exceptional aspect of Title VII." It is well settled that liquidated and exemplary damages are not recoverable under Title VII. See 42 U.S.C. § 2000e-5(g); Bohen v. East Chicago, Indiana, 799 F.2d 1180, 1184 (7th Cir. 1986) (no damages are available under Title VII); Patzer v. Bd. of Regents of the University of Wisconsin System, 763 F.2d 851, 854 n.2 (7th Cir. 1985) (remedies of Title VII do not include compensatory or punitive damages). Apparently, Mr. Dempsey has conceded that he failed to make a reasonable inquiry into the legal basis

for the claim of liquidated and exemplary damages prior to filing the complaint. "Rule 11 requires counsel to study the law before representing its contents to a federal court. An empty head but a pure heart is no defense." Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir.), cert. denied, 479 U.S. 851 (1986); Blossom, 120 F.R.D. at 100. "Counsel who puts the burden of study and illumination on the defendants or the court must expect to pay attorney's fees under the Rule." Thornton, 787 F.2d at 1154; See In re TCI, 769 F.2d 441 (7th Cir. 1985).

Contrary to Mr. Dempsey's suggestion, ATA had no duty to alert him that liquidated and exemplary damages were not recoverable under Title VII although ATA had questioned Ms. Chambers about the issue of emotional distress

during her deposition. See Thornton, 787 F.2d at 1154. Whether ATA expended any additional effort between its decision to file a motion to strike and Mr. Dempsey's withdrawing the claim for liquidated and exemplary damages is not relevant.

Mr. Dempsey took no action to dismiss the claim for the damages after he received ATA's letter informing him that continued pursuit of the claim, among others, could lead to Rule 11 sanctions. In fact, Mr. Dempsey did not agree to dismiss the claim until six weeks after ATA's motion to strike. See Blossom, 129 F.R.D. at 100 (continued pursuit of a frivolous claim after it was clear that the underlying factual basis for the claim did not exist was sanctionable conduct under Rule 11).

Mr. Dempsey was employed by Ms. Chambers 11 months prior to the time when the complaint was filed; therefore, he had substantial time to research the relevant law and proofread the complaint. The issue of damages was not complex but was basic to Title VII law, and the complaint does not claim to be a good faith effort to extend or modify existing law. Therefore, the court concludes that Mr. Dempsey should be sanctioned under Rule 11 with regard to the claim for liquidated and exemplary damages.

B. Petition to Restrict Solicitation of Exclusions or Individual Settlements

Mr. Dempsey filed a petition on behalf of Ms. Chambers seeking to restrict ATA from soliciting exclusions or individual settlements from potential class members. The basis for the

petition was that any exclusions or settlements obtained by ATA would subvert Rule 23 of the Federal Rules of Civil Procedure, which governs class actions in federal court. ATA contends that Mr. Dempsey should be sanctioned for filing the petition because there were no facts or law to support it.

At a hearing on the petition, the court instructed Mr. Dempsey that Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981) provides the format for the presentation of information to the court necessary to support the petition. The court found that the petition was anticipatory because no factual basis was presented to support the restriction on communication.

Mr. Dempsey asserts that the petition did not request a ban on all communications, but merely sought to

limit individual settlements and, therefore, was not necessarily controlled by Gulf Oil. Although Gulf Oil involved a complete ban on all communications concerning the class action between the parties and potential class members, the decision was not limited to that situation.

In Gulf Oil, the Supreme Court made clear that:

> [T]o the extent that the district court is empowered . . . to restrict certain communications in order to prevent frustration of the policies of Rule 23, it may not exercise the power without a showing by the moving party of the particular abuses by which it is threatened. Moreover, the court must find that the showing provides a satisfactory basis for relief and that the relief sought would be consistent with the policies of Rule 23 giving explicit consideration to the narrowest possible relief which would protect the respective parties.

Id. at 102 (quoting Coles v. Marsh, 560 F.2d 186, 189 (3d Cir.), cert. denied, 434 U.S. 985 (1977)) (emphasis added). The Court also stated that an order limiting communications between parties and potential class members should be based on a clear record and specific findings. Id. at 103. Accordingly, this court properly denied Ms. Chambers' petition because it was unsupported.

ATA maintains that Mr. Dempsey's failure to proffer any facts to support the petition indicates that he failed to make a reasonable inquiry prior to filing the petition. ATA notes that Mr. Dempsey continued to pursue the claim even after ATA had informed him that neither the facts or the law supported his arguments. Although Mr. Dempsey should have included facts to support the petition, the court

does not believe that Mr. Dempsey should be sanctioned beyond the denial of the petition.

C. Petition for Enlargement of Time to Move for a Determination under Rule 23(c)(1)

ATA asserts that sanctions should be imposed against Mr. Dempsey for petitioning for an enlargement of time to move for a class action determination when he had already moved for such a determination.

In October, 1988, Mr. Dempsey filed a Petition to Certify Action as Class Action. The petition recited facts to support a class action and stated that:

> Plaintiff respectfully moves this Court, pursuant to Fed. R. Civ. P. 23(b)(2) or in the alternative Fed. R. Civ. P. 23(b)(3) to certify this action as a class action and to

certify plaintiff as a representative of her class.

* * *

Wherefore, plaintiff respectfully moves this Court to enter an order certifying this case as a class action.

Mr. Dempsey also filed a brief to support the certification of the action as a class action.

On November 21, 1988, ATA requested an enlargement of time to respond to the petition. On January 6, 1988, ATA wrote a letter to Mr. Dempsey stating that the suit could not be maintained as a class action.

Mr. Dempsey then filed a Petition for Enlargement of Time in Which to Move for Class Certification under Rule 23(c)(1) of the Federal Rules of Civil Procedure. He stated that he needed additional time in order to engage in

discovery to determine whether the action could be maintained as a class action. The court granted the petition.

ATA filed a memorandum in opposition to the petition for certification, and subsequently requested reconsideration of the court's grant of Mr. Dempsey's petition for enlargement of time and moved to stay discovery on class issues. ATA argued that Mr. Dempsey had already moved for class determination several months earlier and therefore an extension of time was unnecessary. Mr. Dempsey filed a memorandum in opposition to ATA's request for reconsideration in which he stated that the October 1988 pleadings were not a motion for class action determination under Rule 23(c) but rather under Rule 23(b).

At a hearing on the matter, Mr. Dempsey informed the court that he was seeking certification under Rule 23(b)(2) and 23(b)(3), not under Rule 23(c). He admitted that the October 1988 pleadings were erroneously captioned and asserted that the pleadings could not have been considered as a request for class certification because all of the facts necessary for such a determination were not yet before the court. After asking Mr. Dempsey to explain the language used in the October 1988 pleadings, the court withdrew its order allowing Mr. Dempsey additional time to move for a class action determination and ordered a stay of class discovery.

Mr. Dempsey's response to ATA's motion for sanctions asserts that ATA has disregarded an alleged two-step process

for seeking class certification under Rule 23 and (former) Local Rule 8 by presuming that when he filed the October 1988 pleadings he felt the case was ready for a factual determination on whether class certification should occur. He states that ATA has ignored the "obvious" tracking of Rule 23(b) and (former) Local Rule 8.

Mr. Dempsey maintains that under the rules the case must first be presented as one seeking class action and must set forth the grounds upon which class status is sought. A petition is then filed with the court within 90 days requesting the court to proceed with the determination as to whether class status will be granted.

Even if Mr. Dempsey's explanation of the procedure was correct, however, the

court found that the initial pleadings, filed in October 1988, clearly requested the court to certify the action as a class action under Rule 23(b) and to certify Ms. Chambers as the representative of the class.

ATA maintains that it needlessly engaged in discovery, research and preparation of a memorandum opposing class certification, and engaged in preparation for and attendance at the hearing on the matter. ATA maintains that Mr. Dempsey improperly misled the court into granting an enlargement of time.

Although Mr. Dempsey might have been mistaken about the procedure for seeking certification of a class action, ATA's research and preparation for opposing class certification was necessary

regardless of whether Mr. Dempsey moved for certification more than once. Therefore, no sanctions will be imposed with regard to this matter.

D. Misrepresentation as to the deposition testimony of Laura Knowles

Finally, ATA maintains that the court should sanction Mr. Dempsey for misrepresenting to the court the testimony of a witness. Mr. Dempsey filed an affidavit prepared by Ed Latimer as an exhibit to Ms. Chambers' brief in support of certification as a class action. In responding to ATA's motion to strike Mr. Latimer's affidavit, Mr. Dempsey stated that Ms. Chamber's supervisor at ATA, Laura Knowles, " . . . admitted in deposition that she had made negative statements about Chambers to at least one individual identifying himself

as a prospective employer (Deposition of Laura Knowles. pp. 19-22, attached)."

ATA replied by pointing out that the cited portion of the deposition shows that Ms. Knowles did not admit to making any negative comments concerning Ms. Chambers to any prospective employers. In the cited testimony, Ms. Knowles acknowledged that she had spoken with a prospective employer concerning Ms. Chambers and had referred the inquiry to ATA's Human Resources Department. She stated that she had no recollection of making any statements to the prospective employer concerning Ms. Chamber's quality of work or whether she would be favorably considered for reemployment. ATA maintains the Mr. Dempsey's characterization of Ms. Knowles'

testimony is knowingly inaccurate and sanctionable.

In response, Mr. Dempsey concedes that the response to ATA's motion to strike should have stated that Ms. Knowles did not recall or denied recalling the statements which she was alleged to have made. This conduct does not rise to the level of sanctionable conduct under Rule 11 or 28 U.S.C. § 1927.

Therefore, the court will impose sanctions against Mr. Dempsey under Rule 11 because he failed to make a reasonable inquiry into the legal basis for the claim of liquidated and exemplary damages prior to filing the complaint. Counsel for ATA is instructed to submit its expenses and costs to the court related to such issue within 10 days; Ms.

Chambers will have 10 days to respond; and ATA will have 5 days to reply to that response. The court will impose sanctions after considering the parties' submissions. The remainder of ATA's motion for sanctions will be denied.

The rulings discussed herein will be issued in a separate final order pursuant to Rule 58 of the Federal Rules of Civil Procedure after the court considers the amount of sanctions sought by ATA. Accordingly, a final order on the issues addressed in this entry is not made at this time, and when issued, it will include the amount of the sanctions. The court

intends to issue that order within a short time after reviewing the parties' submissions on the sanctions amount.

ALL OF WHICH IS ENTERED this 20th day of October 1992.

John Daniel Tinder, Judge
United States District Court

Copies to:

Gordon Dempsey
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Gregory Utken
BAKER & DANIELS
300 North Meridian Street
Suite 2700
Indianapolis, IN 46204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BECKY CHAMBERS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP 88-1203-C
	)	
AMERICAN TRANS AIR, INC.,	)	
	)	
Defendant.		

ENTRY IMPOSING SANCTIONS AGAINST ATTORNEY GORDON DEMPSEY

For the reasons set forth in an Entry and Order filed on October 20, 1992, the court granted ATA's Motion for Sanctions against Mr. Dempsey, Plaintiff's Counsel, under Rule 11 of the Federal Rules of Civil Procedure because Mr. Dempsey had failed to make a reasonable inquiry into the legal basis for the claim of liquidated and exemplary damages prior to filing the complaint in this case. After considering the

parties' submissions on the matter, the court will now impose sanctions.

Counsel for ATA has submitted a verified statement with respect to sanctions along with supporting documentation. Counsel asserts that 1.6 hours was spent in preparation of ATA's Motion to Strike claims for exemplary and liquidated damages, and that .4 hours wa spent in drafting a letter to Mr. Dempsey advising him that such damages were not recoverable.

Fees incurred in prosecuting a motion for Rule 11 sanctions are also recoverable. See e.g., Blossom v. Blackhawk Datson, Inc., 120 F.R.D. 91, 103 (S.D. Ind. 1988). ATA filed a Verified Motion for Supporting Memorandum under Rule 11 on four points. Counsel for ATA acknowledge that the Court granted ATA's Motion for Sanctions on

only one of the four bases it sought sanctions, and therefore all of the time spent in preparation of the motion and memorandum should not be included. Counsel submits that 7.1 hours was spent in preparation of the motion and memorandum with regard to the issue of exemplary and liquidated damages. In addition, Counsel asserts that 1.6 hours was expended in preparing a reply to Mr. Dempsey's response to ATA's motion with regard to that issue.

The hourly rates for ATA's counsel were: $150/hr for two attorneys, and $95/hr for a third attorney. The total amount of attorney's fees sought by Counsel for ATA is $1,517.

Mr. Dempsey responds by arguing that ATA's Motion to Strike was filed prematurely, that ATA's Counsel had engaged in sanctionable conduct, and that

the time expended by ATA's counsel on the damages issue was excessive.

The court finds that the time expended by ATA's Counsel, as well as Counsel's hourly rate, are reasonable. Therefore, sanctions in the amount of $1,517 will be imposed against Mr. Dempsey.

ALL OF WHICH IS ENTERED THIS 2ND DAY OF DECEMBER, 1992.

_____

John Daniel Tinder, Judge
United States District Court

Copies to:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BECKY CHAMBERS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP 88-1203-C
	)	
AMERICAN TRANS AIR, INC.,	)	
	)	
Defendant.		

ORDER DIRECTING ATTORNEY GORDON DEMPSEY TO PAY SANCTIONS IN THE AMOUNT OF $1,517 TO COUNSEL FOR ATA

For the reasons set forth in an Entry filed contemporaneously with this Order, the Court imposes sanctions against Mr. Dempsey in the amount of $1,517. These sanctions are imposed against Mr. Dempsey under Rule 11 of the Federal Rules of Civil Procedure because Mr. Dempsey had failed to make a reasonable inquiry into the legal basis for the claim of liquidated and exemplary

damages prior to filing the complaint in this case.

Accordingly, the court ORDERS Mr. Dempsey to remit $1,517 to Counsel for ATA within thirty days of this Order.

ALL OF WHICH IS ORDERED this 2nd day of December, 1992.

_____

John Daniel Tinder, Judge
United States District Court

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BECKY CHAMBERS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP 88-1203-C
	)	
AMERICAN TRANS AIR, INC.,	)	
	)	
	)	

Defendant.

ENTRY DIRECTING NUNC PRO TUNC JUDGMENT

On May 23, 1991, the Court entered summary judgment in favor of the Defendant. The Plaintiff filed a motion for relief under Rules 59 and 60 of the Federal Rules of Civil Procedure which the court denied by entry on October 20, 1992. In that entry, the court addressed the Defendant's motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure. The Court stated:

> The rulings discussed herein will be issued in a separate final order pursuant to Rule 59 of the Federal Rules of Civil

Procedure after the court considers the amount of sanctions sought by ATA. Accordingly, a final order on the issues addressed in this entry is not made at this time, and when issued, it will include the amount of the sanctions.

On December 2, 1992, the court issued an entry and order directing the Plaintiff's counsel to pay sanctions. However, the court inadvertently failed to order the rulings discussed in the October 20, 1992 entry.

A court may issue a nunc pro tunc order to supply omissions in the records of the court regarding something done in the past, which by mistake or neglect was not properly entered in the court's records. Cf. United States v. Taylor, 841 F. 2d 1300, 1308 (7th Cir. 1988). The effective date of a nunc pro tunc order is the date of the original action which is being corrected.

A nunc pro tunc order would be appropriate in this case, so that the December 2, 1992 judgment will reflect the finality with regard to the rulings discussed in the October 20, 1992 entry. Accordingly, a nunc pro tunc judgment will be entered, effective as of December 2, 1992.

ALL OF WHICH IS ENTERED this 8th day of January, 1993.

_____

John Daniel Tinder, Judge
United States District Court

Copies to:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ECKY CHAMBERS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP 88-1203-C
	)	
MERICAN TRANS AIR, INC.,	)	
	)	
Defendant.	)	

ENTRY DIRECTING NUNC PRO TUNC JUDGMENT

On May 23, 1991, the court entered summary judgment in favor of the Defendant. The Plaintiff filed a motion for relief under Rules 59 and 60 of the Federal Rules of Civil Procedure which the court denied by entry on October 20, 1992. In that entry, the court addressed the Defendant's motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure. The court stated:

> The rulings discussed herein will be issued in a separate final order

> pursuant to Rule 58 of the Federal Rules of Civil Procedure after the court considers the amount of sanctions sought by ATA. Accordingly, a final order on the issues addressed in this entry is not made at this time, and when issued, it will include the amount of the sanctions.

On December 2, 1992, the court issued an entry and order directing the Plaintiff's counsel to pay sanctions. However, the court inadvertently failed to order the rulings discussed in the October 20, 1992 entry.

A court may issue a nunc pro tunc order to supply omissions in the records of the court regarding something done in the past, which by mistake or neglect was not properly entered in the court's records. Cf. United States v. Taylor, 841 F.2d 1300, 1308 (7th Cir. 1988). The effective date of a nunc pro tunc order

is the date of the original action which is being corrected.

A nunc pro tunc order would be appropriate in this case so that the December 2, 1992 judgment will reflect the finality with regard to the rulings discussed in the October 20, 1992 entry. Accordingly, a nunc pro tunc judgment will be entered, effective as of December 2, 1992.

ALL OF WHICH IS ENTERED this 8th day of January 1993.

_____

John Daniel Tinder, Judge

United States District Court

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Becky CHAMBERS,

Plaintiff-Appellant,

v.

AMERICAN TRANS AIR, INC.,

Defendant-Appellee.

No. 93-1057.

United States Court of Appeals,

Seventh Circuit.

Argued Oct. 29, 1993.

Decided Feb. 28, 1994.

Rehearing and Suggestion for Rehearing In Banc Denied May 4, 1994.

As Modified May 18, 1994.

Before CUMMINGS and CUDAHY, Circuit Judges, and LEINENWEBER, District Judge.

The Honorable Harry D. Leinenweber, District Judge of the United States District Court for the Northern District

of Illinois, Eastern Division, is sitting by designation.

CUDAHY, Circuit Judge. Becky Chambers brought this Title VII action against her employer, American Trans Air, Inc. (ATA). Chambers worked for ATA from October 1982 until July 1987, first as a contract administrator and later as a crew planner. In June 1987, Chambers wrote a letter to her supervisor tendering her resignation, effective July 18, "pending correction" of two areas. Specifically, she demanded a pay increase, and that the company hire additional crew planners.

Rather than bowing to her demands, Chambers' supervisor accepted her resignation. After filing a charge with the Equal Employment Opportunity Commission (EEOC), Chambers brought this suit, claiming violations of Title VII,

42 U.S.C. s 2000e et seq. As the district court interpreted her complaint (and Chambers does not here object to this interpretation), it asserts seven claims, averring that Chambers was twice denied promotions and three times denied pay increases to which she was entitled. She also alleged that she was subject to "heavier workloads, harsher discipline ... and overt hostility from her supervisor" on account of her sex, and that she was constructively discharged. She also sought certification as a class action. ATA moved for, and the district court ultimately granted, summary judgment against Chambers on each of these claims. Having no individual claim, the court also found that Chambers could not serve as a class representative. Finally, the court sanctioned Chambers' attorney under Fed.R.Civ.P. 11

for pressing a claim for liquidated and exemplary damages when Title VII permitted no such relief. We affirm in all respects.

I. Rule 56(f).

[1] A party opposing a motion for summary judgment must "designate 'specific facts showing that there is a genuine issue for trial.' " Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56(e)). The opposing party will typically do this by submitting affidavits showing that material facts are in dispute. The court here found that Chambers failed to show the existence of a material dispute. But that is not surprising, because Chambers never put forward any evidence purporting to do so. Instead, Chambers twice asked for more time, though she never explained

(as the rules require) why more time was necessary. The court therefore examined the record in the case as it then existed, found that Chambers had not shown the existence of a material factual dispute and entered summary judgment. Whether summary judgment was appropriate, then, turns (at least in part) on whether the court was within its discretion in deciding the summary judgment motion when it did.

Chambers' response to ATA's motion for summary judgment was less than artful. She first asked for an extension of time to respond, until February 29, 1989, and the court granted the extension. But that date did not exist. When she did respond on March 1 (which the court treated as timely), she asked for another extension of time. ATA opposed that motion.

Federal Rule of Civil Procedure 56 gives a party opposing a motion for summary judgment two choices. It can either respond, filing an affidavit showing the existence of a triable issue of fact, Fed.R.Civ.P. 56(e), or, if it appears "from the affidavits of a party opposing the motion that he cannot for reasons stated" show the existence of an issue of fact, the court may allow further discovery. Fed.R.Civ.P. 56(f).

The first time that Chambers asked for an extension of time, the court apparently overlooked her failure to submit an affidavit explaining why more time was needed. But, when Chambers asked for a second extension of time, ATA objected, arguing that Rule 56(f) required Chambers to submit an affidavit explaining why more time was necessary. Chambers responded to this argument by

moving to file a Rule 56(f) affidavit out of time, all the while insisting that she already had enough evidence to show the existence of a material issue of fact. The court responded by giving Chambers another 30 days to address the question whether her action was barred by the statute of limitations, but otherwise reserved judgment. The court ultimately granted summary judgment in part, finding that some of Chambers' claims were barred by the statute of limitations. As to those claims that were not, the court denied her motion to file a Rule 56(f) motion out of time as well as her motion for an extension of time. It then treated Chambers' proffered Rule 56(f) affidavit as a Rule 56(e) response to the motion for summary judgment and proceeded to decide the summary judgment motion.

It ultimately granted summary judgment in favor of ATA on the remaining claims.

Chambers here contends that the district court abused its discretion in denying her motion for an extension of time. It is unrealistic, Chambers argues, to expect Title VII plaintiffs represented by busy attorneys in small law firms to respond to motions for summary judgment before they have completed discovery. But as this court has noted, the "fact that discovery is not complete--indeed, has not begun--need not defeat the motion. A defendant may move for summary judgment at any time." American Nurses Ass'n v. Illinois, 783 F.2d 716, 729 (7th Cir.1986). While a motion for summary judgment should not be granted unless it is abundantly clear that no material issue of fact exists, Rule 56 requires the

party opposing a summary judgment motion to come forward with some evidence showing the existence of such a factual dispute. If a party cannot present "facts essential to justify his opposition," Rule 56(f) requires that it explain why. The court is then permitted to deny the motion for summary judgment, allow further discovery, or "make such other order as is just." Fed.R.Civ.P. 56(f). Chambers' counsel says that it is unrealistic to expect her to be able to come forward with facts. Even if this doubtful assertion is correct, Rule 56(f) expressly sets up a device by which counsel is permitted to advance this argument, the Rule 56(f) affidavit. Because Chambers' failed to file a timely Rule 56(f) affidavit, the court's refusal to give Chambers any further time for additional discovery was not an abuse of

discretion. See Otto v. Variable Annuity Life Ins., 814 F.2d 1127, 1138 (7th Cir.1986), cert. denied, 486 U.S. 1026, 108 S.Ct. 2004, 100 L.Ed.2d 235 (1988).

Satisfied that the court was not required to wait for Chambers to proffer any further evidence before ruling on the motion for summary judgment, the question is whether, on the evidence the court had before it, there existed a triable issue of material fact. As noted, the district court interpreted Chambers' complaint as asserting seven different claims: two claims for failure to promote (1983 and 1987), three claims for failure to receive a pay increase (1983, August 1986, December 1986), one "constructive discharge" claim and one claim that she was subjected to "harsher discipline, heavier work loads and overt hostility" from her supervisor on account of her

sex. The court granted summary judgment on some claims on statute of limitations grounds and on the rest for failure to show a genuine issue of material fact.

II. Failure to promote.

With respect to the 1983 denial of promotion claim, the district court found that Chambers' claim was barred by the statute of limitations. Under Title VII, a plaintiff must file a claim with the Equal Employment Opportunity Commission (EEOC) "within one hundred and eighty days after the alleged unlawful employment practice occurred" or be barred. 42 U.S.C. s 2000e-5(e). See Alexander v. Gardner-Denver Co., 415 U.S. 36, 47, 94 S.Ct. 1011, 1019, 39 L.Ed.2d 147 (1974). Chambers filed her EEOC charge on January 5, 1988, and any claim for discrimination that occurred before March 11, 1987 is therefore time-barred.

She argues, however, that her failure to promote claim from 1983 should nonetheless survive on a "continuing violation" theory. That doctrine contemplates that activity occurring beyond the limitations period can be challenged if it is part of a pattern of discrimination that extended into the limitations period. See generally Douglas Laycock, "Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues", 49 Law & Contemp. Probs. 53 (1986). But we need not decide the "continuing violation" question because, even if the 1983 claim is not time-barred, it is outside the scope of Chambers' EEOC charge.

Filing an EEOC charge, of course, is a prerequisite to suit under Title VII, in order for the EEOC to have a chance to settle disputes before lawsuits are

undertaken. Alexander, 415 U.S. at 44, 94 S.Ct. at 1017. As a result, to prevent circumvention of the EEOC's investigatory and conciliatory role, only those claims that are fairly encompassed within an EEOC charge can be the subject of a resulting lawsuit. See Babrocky v. Jewel Food Co. & Retail Meatcutters, 773 F.2d 857, 863 (7th Cir.1985). Accord Schnellbaecher v. Baskin Clothing Co., 887 F.2d 124 (7th Cir.1989). Chambers' EEOC charge complains only about unequal compensation, not failure to receive promotions. The charge alleges that male employees "were paid more money," and that Chambers "wrote asking that the inequity be corrected." Although Chambers argues that this incorporates pay inequities resulting from promotion denials, promotion is not mentioned nor do we think it is fairly implied.

Therefore, since failure to promote is outside the scope of the charge, summary judgment was correctly entered against Chambers on her claims that she was denied promotions to which she was entitled, both in 1983 and in 1987.

III. Wage discrimination.

Chambers claims that there were three wage increases that she should have received but did not, on account of her sex, one in 1983 and one in 1986. The district court found that one of Chambers' three wage discrimination claims--the one in 1983--was barred by the statute of limitations. Pay increases are typically continuing violations, because each pay check at a discriminatory rate is seen as the basis for a separate claim. Bazemore v. Friday, 478 U.S. 385, 395-96, 106 S.Ct. 3000, 3006, 92 L.Ed.2d 315 (1986). But here

Chambers was briefly promoted (without a pay increase) in 1983, and then demoted back to her previous position. The district court therefore correctly concluded that this allegedly discriminatory action had no continuing effect inside the limitations period.

But even if the claim were not time barred, summary judgment was appropriate for the same reasons that the court granted summary judgment on the two 1986 claims: Chambers has failed to show a material factual dispute. In this connection, Chambers simply puts forward no evidence of a pay inequity. Plaintiff's brief essentially admits as much, insisting that it should be allowed further discovery to adduce supporting evidence. "There were probably various wage decisions about her, of which she had no personal knowledge. Ms. Chambers

must be allowed, at a minimum, to compare herself to males of similar experience and ability." Pl.Br. at 28. But as noted, in light of the plaintiff's Rule 56 deficiencies, the district court was within its discretion in granting summary judgment without allowing further discovery.

The plaintiff's claim is that she was entitled to three pay increases, but was denied them on the basis of her sex. A plaintiff claiming disparate treatment must (1) put forward direct evidence of illegal motive linked to the challenged employment decision, or (2) establish illegal motive indirectly through the three-step model of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). As a first step in the McDonnell Douglas process, Chambers must show that as a female she

was treated differently than a similarly situated male.

There are some affidavits showing general gender discrimination at ATA. For example, Edward Latimer, a former vice president of ATA, testified in an affidavit that sexism was pervasive in the corporation, and that some women managers were paid less than male managers in comparable positions. But there is no link from this information to employment decisions involving Chambers. Liability under Title VII does not turn on the bigotry of company managers unless that bigotry resulted in injury to the plaintiff. A showing of other instances of discrimination in the company may have evidentiary value, but it is not a substitute for a showing of injury to the plaintiff. There therefore needs to be a link between an ATA's manager's alleged

prejudice, and the decisions that Chambers is challenging. See Shager v. Upjohn, 913 F.2d 398, 405 (7th Cir.1990). Lacking direct evidence, we turn to the question whether, under the burden-shifting analysis set out in McDonnell Douglas, Chambers can survive the summary judgment motion. We find that she cannot. Because there is no evidence in the record showing that Chambers was treated any differently than a similarly situated male, based on the record Chambers cannot make out a prima facie case of discrimination. This, of course, may be due to the fact that the court decided the summary judgment motion before Chambers conducted much discovery. The record contains no evidence of what any of ATA's employees were paid. Chambers is therefore unable to point to payroll records, pay stubs or any other

evidence to suggest that she was paid less than similarly situated men.

Nor is it even clear that, had the court allowed the plaintiff an opportunity for further discovery, it would have helped Chambers' case. As the district court noted, Chambers herself testified in a deposition that she had no reason to believe that she failed to receive any of the three wage increases because she is a woman. While this statement would not entitle ATA to summary judgment if, in fact, the rest of the record contained evidence sufficient to create a triable issue of material fact, in the absence of any such evidence the district court correctly granted summary judgment in favor of the defendant on these claims.

IV. Hostile environment.

Chambers also alleges that she was subject to "harsher discipline, heavier work loads and overt hostility" from her supervisor. Title VII, of course, is not limited to economic discrimination, but rather is intended "to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." Meritor Savings Bank v. Vinson, 477 U.S. 57, 64, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986). The Court recently reaffirmed this principle, and rejected the rule, adopted by a number of circuit courts, under which an employee needed to show that she suffered psychological harm in order to make out a hostile work environment claim. Harris v. Forklift Systems, --- U.S. ----, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

The EEOC's new proposed guidelines emphasize that "title VII affords employees the right to work in an environment free from discriminatory intimidation, insult, and ridicule." 58 Fed.Reg. 51266, 51267 (1993) (proposed 29 C.F.R. ss 1609.1, 1609.2). Thus, under the proposed guidelines, harassing "conduct may be challenged even if the complaining employee(s) are not specifically intended targets of the conduct." Id. (proposed 29 C.F.R. s 1609.1(e)).

Chambers insisted that she was subjected to "harsher discipline, heavier work loads and overt hostility" from her supervisor. The district court granted summary judgment for ATA on all of these claims, concluding that these issues were first raised in Chambers' reply brief. We agree that no allegation of harsher

discipline or heavier work loads appears in her complaint or EEOC charge. But we disagree with this conclusion insofar as it relates to the allegation of "overt hostility." Chambers' EEOC charge alleges that "females, including those in management, were routinely referred to in vulgar sexist language in their absence, by the highest levels of management." In our view, this allegation fairly raises the issue of "hostile work environment."

In addition, the record contains some evidence to support this charge. For example, Edward Latimer, the former vice president of ATA, said in his affidavit, that the CEO of the company "routinely referred to the chief stewardess as the 'head screw'." Latimer's affidavit also alleges that the CEO referred to other female employees in sexist, vulgar and patently offensive terms. We therefore

find that Chambers did fairly allege a hostile work environment claim in her EEOC charge, and that there is perhaps enough evidence in the record on this account for her to survive the motion for summary judgment.

But even so, Chambers has not pursued a hostile work environment claim on appeal. Chambers' attorney argued primarily (and in our view unpersuasively) that the language in Chambers' EEOC charge alleging that she was "required" to check the work of co-employees raised the issue of harsher discipline and heavier work loads. Pl.Br. at 18-20. Chambers' appellate brief also contends that because the EEOC charge alleges "chauvinism," the "overt hostility" claim is preserved.

As noted, there may be evidence in the record supporting a hostile work

environment claim under the framework the Supreme Court laid out in Meritor and refined in Harris. But while the passing references on appeal to "overt hostility" can be viewed as an attempt to raise this issue, they are insufficient. "A party urging us to reverse a district court's judgment has an obligation to argue why we should reverse that judgment, and to cite appropriate authority to support that argument." United States v. Berkowitz, 927 F.2d 1376, 1384 (7th Cir.1991). Chambers' counsel never once cited to Meritor or any other hostile work environment case. "We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived." Berkowitz, 927 F.2d at 1384. While there may be, on these facts, enough evidence of hostile work

environment to entitle a plaintiff to go to trial, the papers filed both in the district court and on appeal make only passing reference to this claim. While the arguments below may have sufficed to preserve the issue for appeal, we will not reverse the entry of summary judgment based on skeletal snippets of argument without citation to authority.

V. Constructive discharge.

The district court granted summary judgment on Chambers' claim that she was constructively discharged. In her letter of resignation, Chambers indicated that she would resign unless she received a pay increase and additional crew planners were hired. But in order to state a claim for constructive discharge, a plaintiff needs to show that her working conditions were so intolerable that a reasonable person would have been

compelled to resign. Henn v. National Geographic Society, 819 F.2d 824 (7th Cir.), cert. denied, 484 U.S. 964, 108 S.Ct. 454, 98 L.Ed.2d 394 (1987). The district court found as a matter of law that the conditions were not so intolerable so as to require a reasonable person to resign. Entry (May 23, 1991) at 21.

We affirm for a slightly different reason. The constructive discharge doctrine is a judicially-created response to the fact that Title VII, as originally enacted, afforded no damages remedy to a harassment victim for emotional trauma or even for medical expenses she may have incurred. Thus, courts have said that where conditions are so intolerable that a reasonable person would feel compelled to resign, a plaintiff may do that, and

then sue for reinstatement and back pay.[14]

Where work conditions are intolerable, under the constructive discharge doctrine a plaintiff can resign, and then bring suit against her employer as if she were fired. But to be actionable under Title VII the work conditions need to be more than merely intolerable--they need to be intolerable in a discriminatory way. Chambers demanded that she receive a pay increase and that the company hire additional workers. The district court found that the company's refusal to acquiesce did not, as a matter of law, make Chambers' working conditions intolerable. Perhaps that is correct, but even more

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[14]The Civil Rights Act of 1991, in any event, amends Title VII to allow a damages remedy.

fundamentally, as we explained in our discussion of Chambers' wage claims (at 6-8), there is no showing that ATA's decisions were discriminatory. Here too, Chambers testified in her deposition that none of these conditions had anything to do with her sex and that she had no facts suggesting that they did. That being the case, those conditions, even if intolerable, do not give rise to a cause of action under Title VII.

VI. Class certification.

Having entered summary judgment in favor of ATA on all of Chambers' individual claims, the district court denied Chambers' motion for class certification as moot. Because we affirm the entry of summary judgment, we follow suit on the class action certification. An individual bringing an action on behalf of a class must be a member of the

class and "possess the same interest and suffer the same injury" as members of the class. E.g. Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 216, 94 S.Ct. 2925, 2929-30, 41 L.Ed.2d 706 (1974). Having no individual cause of action, Chambers cannot represent a class.

VII. Sanctions.

The district court imposed Rule 11 sanctions in the amount of $1,517 against Chambers' attorney for pressing a claim for liquidated and exemplary damages. When the complaint was filed in 1988 (before the Civil Rights Act of 1991), it was clear that Title VII did not allow the recovery of liquidated and exemplary damages. Bohen v. East Chicago, Indiana, 799 F.2d 1180, 1184 (7th Cir.1986). Rule 11 requires that all pleadings be signed, and that the signature

"constitutes a certificate by the signer that ... to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Gordon Dempsey, Chambers' attorney, conceded that he did not make a reasonable inquiry into the legal basis for the claim before filing the complaint, describing the claim for liquidated and exemplary damages as a "drafting oversight." On ATA's motion, the district court imposed sanctions against him, concluding that Rule 11 sets out an objective test, and observing that an "empty head but a pure heart is no defense." Entry (October 20, 1992) at 18 (quoting Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir.), cert. denied, 479 U.S.

851, 107 S.Ct. 181, 93 L.Ed.2d 116 (1986)).

Dempsey responds in his appellate brief by saying that the district court, in attributing his error to an "empty head," was "a bit harsh". Pl.Br. at 32. Dempsey continues (referring to himself in the third person) in his own defense:

> Ms. Chambers' lawyer was within 3 points of the cut-off for National Merit finalist, a state debate champion, recipient of a George F. Baker Trust Fund (see letterhead, Harvard Business School) full scholarship to one of the 3 or 4 most selective colleges in his state [Wabash, interestingly, an all male college] and a stronger student there GPA wise than all but one of his classmates and fraternity brothers now practicing with ATA's highly prestigious law firm, Baker & Daniels. He was a

stronger student by the same standard, than all but one of his classmates now practicing with any of the state's 3 largest law firms. He had 2 varsity letters in a collision sport, and was president of what may well have been the strongest fraternity on campus. He scored in the 95th percentile on the general background portion of his law boards. He was trained at a law school, where the average LSAT's are shown as exceeded by only 4 schools, in the U.S. News survey of March 19,1990 [Duke]. He has tried 31 jury trials in various parts of Indiana, and chaired 4 trial seminars, attended by 50-350 lawyers.

Id. at 33 (brackets in original).

But unfortunately for Mr. Dempsey, this long list of accolades and accomplishments provides no defense. As we noted in Thornton, the "[t]est under Rule 11 is

objective." The point is that "every lawyer must do the necessary work to find the law before filing the brief." Thornton, 787 F.2d 1151, 1154 (7th Cir.1986). That admonition applies even to lawyers who have two varsity letters in a collision sport and who were presidents of their fraternities. Mr. Dempsey failed to comply with the rule's clear edict, and the district court was correct to impose sanctions.

ATA finally moves this court to sanction Dempsey pursuant to Fed.R.App.P. 38 for bringing this appeal. But Rule 38 sanctions are appropriate only when an appeal is frivolous. While we affirm the district court, we do not find the appeal to be a frivolous one, and therefore decline the invitation to impose Rule 38 sanctions.

VIII. Conclusion.

For the reasons explained herein, the judgment of the district court and the order imposing Rule 11 sanctions are AFFIRMED. The request for Rule 38 sanctions is DENIED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

7th Circuit Order
Denying Rehearing

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Before

Hon. Walter Cummings, Circuit Judge

Hon. Richard D. Cudahy, Circuit Judge

Harry D. Leinenweber, Judge

B E C K Y C H A M B E R S ,

Plaintiff-Appellant,

v.

AMERICAN TRANS AIR, INC.,

Defendant-Appellee.

No. 93-1057.

United States Court of Appeals,

Seventh Circuit.

ORDER

On consideration of the position for rehearing and suggestion for rehearing in

banc filed in the above-captioned cause, no judge in active service has requested a vote thereon, and all of the judges on the original panel voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

Affidavits

AFFIDAVIT

Comes now Edward L. Latimer, being first duly sworn, and for his Affidavit says:

1. I am the Edward Latimer who until late 1987, served as Vice President and General Manager of American Trans Air, 7337 W. Washington Street, Indianapolis, Indiana.

2. I came to Indianapolis to work for American Trans Air from Seattle, Washington approximately 3½ years ago.

3. I currently reside in Danville, Indiana.

4. My position was primarily an administrative one, with most staff functions at American Trans Air reporting to me.

5. There was inequality of treatment between males and females at American Trans

Air during the time I was there. I cannot testify personally that it was present in every section, but it did exist in certain areas.

6. Based upon my own observations as set forth below and other feedback I received in the course of performing my duties, such inequality was present in operations, accounting, maintenance, and upper level management. The complaints in operations included complaints from scheduling, both aircraft and crew. There may also have been evidence of unequal treatment in ground services.

7. At least two persons, Tammy Burris and Dawn Culross, were laid off while on maternity leave, and not allowed to return, which offended me.

8. It appeared that other male managers with responsibilities comparable to those of female Bobbi Neher, were paid

considerably larger incomes. She sought a raise to make her pay comparable relative to the work involved, but did not receive it.

9. The manager of interlining, Jenny Hoy, reported to me. The President of the company, Dave Recker, now Executive Vice President said "we need a man in there, a woman is not tough enough to deal with those other airlines." In fact, that position is filled by a woman in the majority of U.S. airlines.

10. The data processing people and myself recommended Carolyn Pascal to fill a slot for interfacing with software vendors servicing the maintenance department. The data processing people and myself recommended her because she was computer literate, but the Vice President for Maintenance and Engineering, John Braun, was quite adamant he did not want

her in the slot, because she was a woman. He wanted two male directors of maintenance, who were not computer literate, to cover the work. Women all tended to be toward the bottom of the hierarchy in maintenance.

11. When Jenny Hoy first was placed under me, she was making $19,000.00 to $20,000.00, in contrast to most of the male managers in comparable positions, who were making $25,000.00 to $35,000.00 per year. This disparity resulted from the chauvinistic attitude of her supervisors preceding Jim Hlavacek. In particular, there were substantial complaints about women in operations being paid less than men, under Rick Rowe and his predecessor, Bill Gaddis.

12. The greatest degree of male chauvinism I observed, however, was in top management.

13. The President of the company, George Mikelsons, routinely referred to the chief stewardess as the "head screw."

14. Jim Hlavacek and I identified Sandra Buchanan as a good choice to move from her $35,000.00 per year job to a director's position which needed to be filled, and decided $50,000.00 would be a fair salary for that job, which she agreed to take. When George Mikelsons and Jerry Taylor, the latter of whom controlled the purse strings of American Trans Air, heard of the proposal, they became irate. George Mikelsons said it would be ridiculous to pay that "cunt" $50,000.00 per year. He also said she would be satisfied with $40,000.00, and why were we paying her $50,000.00? Mikelsons is a totally chauvinistic person, and Taylor is also chauvinistic, based on my observations.

15. All raise requests were reviewed

by Jerry Taylor, who also participated in each raise decision.

16. When upper management is as chauvinistic as the management in American Trans Air, it is inevitable that it will work its way down through the organization, in the form of discrimination toward females.

17. It was emphasized that the airline was a captains airline, and employees were quite conscious of the pattern of disparity in pay between pilots on the one hand and administrative persons on the other. However, this was a pattern distinct from and in addition to, the tendency within the company for women to receive less pay for comparable responsibility.

18. The above statements are based upon my own personal observations. To the extent that I have described an atmosphere

or condition of the workplace, such observations were based on the specific incidents enumerated above. I also have considered comments and feedback heard in the course of performing my duties, which tended to reinforce the impressions generated by the specific events observed.

AND FURTHER YOUR AFFIANT SAITH NAUGHT.

/s/ Edward L. Latimer

Edward L. Latimer

NOTARIZATION

STATE OF INDIANA
COUNTY OF SS

Subscribed and sworn to before me a Notary Public in and for the County of Hendricks, State of Indiana, this 24th day of April, 1988.

MY COMMISSION EXPIRES:

March 1, 1991 / s /
Joyce E. Wickham

Notary Public

County of Residence

(SEAL)
Hendricks

Gordon Dempsey
SUTHERLIN & DEMPSEY
2855 One American Square
Box 82050
Indianapolis,IN 46282
317/634-6577

STATE OF INDIANA)
)SS:
COUNTY OF MARION)

AFFIDAVIT OF GORDON B. DEMPSEY

Gordon B. Dempsey, being duly sworn upon his oath, deposes and states:

1. I make this affidavit from my personal knowledge.

2. The purpose of this affidavit is to show the Court that we have sufficient facts in hand to warrant denial of summary judgment,and that there are facts which need more development through discovery, before we should be required to respond on the merits to Defendant's Motion for Summary Judgment. FRCP 56(f); Wright-Miller-Kane, Federal Practice and Procedure, Civil 2d §2740 (1983).

3. I have set forth facts in opposition to the 18 numbered sets of facts

in Defendant's "Facts as to Which There is No Genuine Issue and Proposed Conclusions of Law", filed with the Court January 12, 1989, based on interviews conducted with former and current employees of American Trans Air, and attendance of the depositions of Becky Chambers and Laura Knowles.

4. As to items number 1 and 2: Plaintiff rejects Defendant's apparent belief that Plaintiff must understand the legal meaning of the words of Title VII, or the theories.

Nonetheless, Chambers apparently did understand that various "conditions.. of employment" other than pay and promotions were discriminatory, because she testified to a number of such conditions, in her deposition of November 19 and 22, 1988. To point out a few, Chambers testified to: (a) the unbalanced workload

between men and women,including Chambers, in contract administration (Chambers' deposition "C.D.", at pages 80-81; 83-84), (b) women, including Chambers, were reprimanded for things that men were not (C.D. pp. 79-80), (c) men were allowed to travel to visit their accounts, but the women were not (C.D., p. 79), (d) Chambers was demoted for what she believes were pretextual reasons, and a less qualified mail was prompted to the supervisory position (C.D., pp. 73, 92-94, 113-15, 117, 119-20, 133). Chambers was harassed by her supervisor, Laura Knowles, because she was a single woman (C.D. pp. 172, 177-79, 189, 204-05, 213, 215).

5. As to Defendant's number 3, Chambers is challenging both her demotion from contract administration supervisor, and the subsequent promotion of James Martin to that position (See 4(d), supra.

6. As to the Defendant's number 4, Chambers made it very clear that unequal pay was an issue,not merely discrimination in consideration for pay raises, as Defendant characterizes it (C.D., p. 205, 258). Furthermore, she did complain about her pay on several occasions (C.D. p. 87, 258-59, 275) although the fact that she did or did not complain about discriminatory behavior in no way diminishes Defendant's liability for engaging in discriminatory practices.

7. When I read sections 6 and 7 of Defendant's so-called "Facts as to Which There is No Issue" ("Facts"), I find it hard to believe that Defendant's counsel even attended Becky Chambers' deposition; certainly they have not read the transcript of it.

Becky Chambers had been promoted to the position of contract administrator

supervisor, and then was demoted to her former position a few months later (C.D., pp. 85-86, 107). The position was later given to Jim Martin, a man who had less seniority and qualifications than Chambers (C.D., p. 73).

Defendant asserts that Chambers' demotion was because her supervisor, Bobi Neher, was dissatisfied with her performance in the supervisory position (Defendant's Motion for Summary Judgment, p. 15). While it is true that Plaintiff had been told that she lacked initiative and had a communication problem (C.D., pp. 113-14), Chambers disputes the reasons given by her supervisor, as she did at the time of the demotion. Plaintiff had in fact improved communications between two departments that had worked poorly together previously, had evened out the unbalanced workload in the area, and developed the

idea and structure for a new department, which idea was later adopted by the Company (C.D., pp. 78, 83-84, 97, 101-03). Furthermore, Chambers' supervisor after Mrs. Neher commented, on the same performance evaluation in which the negative comments were made, "per Ernie Nicholson, cooperation and communication had not been a problem since he assumed the manager's position." (C.D., pp. 129-130, Defendant's deposition Exhibit No. 10). Chambers believed that the reasons given by Bobi Neher were pretextual (C.D., pp. 113-15, 133). While Chambers did say that she had no evidence that those negative comments or her demotion were because of her sex, she did say that she believed Mrs. Neher's motivation was Chambers' sex (C.D., pp. 79-80), and in fact offered a variety of circumstantial evidence to support her belief, including testimony that Neher

demoted her and promoted a less qualified male (C.D., p. 73); that the EEOC had said it was going to rule in her favor (C.D., p. 74); that Neher allowed the men to travel to visit their accounts but did not allow the women to do so (C.D., p. 79); that women were reprimanded for things that men were not (C.D., pp. 79-80); that Neher assigned lighter work to men and heavier workloads to women (C.D., pp. 80-81, 83-84); that the reasons for Mrs. Neher's discipline of Chambers was unworthy of belief (C.D.,pp. 92-94, 119-20) as were the reasons given for her demotion (C.D., pp. 113-15, 133).

Defendant's assertion that Chambers had no reason to believe, and no facts to support her belief that any discriminatory action was taken by Bobi Neher is fatuous when Chambers has given facts or presented evidence, in the form of her own testimony

at deposition. The fact that Chambers herself does not understand that she has done so, is no excuse for Defendant's gross mischaracterization of her testimony.

8. Regarding Defendant's number 10, Chambers testified that she checked Lon Lett's work the entire time that he was in crew planning, which was about three months, and that she trained Larry McClure for about three months; that she trained or assisted John Petrison and Larry Finkbiner for the entire time that she worked with each of these gentlemen, about one month; and that she was the "senior planner" (C.D., pp. 174, 270, 299, 305). Chambers did more than simply "show the ropes" to the men in the department (C.D., pp. 298, 300).

Defendant notes that when Chambers came into the department, Roberta Sanders, a female, "showed her the ropes and checked

her work." ("Facts", p. 4). What Defendant fails to mention, and which supports Chambers' contention that she should have bene paid more, is that Roberta Sanders was paid about $2,500 more annually than was Chambers. (Affidavit of Dan Copp, p. 2). Chambers believed that Sanders' higher pay was a function of her experience and the fact that she was married to the man who was the manager of the department (C.D., p. 237).

9. In Defendant's sections numbered 11 through 14, defense counsel repeatedly mischaracterizes Chambers' deposition testimony regarding pay and promotions when he says that "she did not have any facts that would indicate that she did not get the promotion... because of her sex", and "she had no reason to believe that she failed to receive any of the challenged wage increases because she was a woman."

("Facts", p. 5)

In her deposition, Chambers had testified repeatedly that her immediate supervisor, Laura Knowles, did not like single women, as opposed to single people, generally (C.D., pp. 177-79, 188-90), a form of "sex-plus" discrimination Phillips vs. Martin Marietta Corp., 400 U.S. 542, 91 Sup. Ct. 496, 27 L.Ed 2d 613 (1971); Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971); ("Sex-plus" discrimination is discrimination based on sex plus some other apparently neutral factor such as being the parent of preschool-aged children. In Phillips, refusal to hire women with preschool-aged children was discriminatory, where men with preschool-aged children were not denied employment. In Sprogis, the "sex-plus" factors were being female and married.)

That Laura Knowles did not adjust the

workload, which was unevenly balanced between the male and female planners, because she didn't like Chambers, and the reason she didn't like Chambers was because she was a single female (C.D., p. 213); that Laura Knowles failed to obtain assistance to help with the workload because she hoped that Chambers would quit (C.D., pp. 215, 232); that she was generally nasty to Chambers, (C.D., pp. 173-79); that Laura Knowles went out of her way to make sure that flight attendants that she did not like would not get desirable trips, while there is no evidence that she did the same towards male crew members (C.D., p. 176.)

Defense counsel questioned Chambers repeatedly about sex discrimination by Defendant in both pay and promotions (C.D., pp. 79-80, 84, 88, 95, 108, 113-15, 127,224-26, 341-32, 236-38, 265-66, 269,

276, 271, 290-292, 356, 360). Chambers had repeatedly set forth the evidence that she had regarding discriminatory practices by the Defendant, or referred back to evidence previously given. (C.D., pp. 73-74, 79-80, 83-84, 95, 113-14, 116, 172-79, 189, 204-05, 213, 215, 232, 238, 266, 276, 281, 291, 292).

Furthermore, defense counsel was well aware of the facts and evidence that Chambers had testified to in answer to his questions at deposition, because he referred to the evidence she had given at several points (C.D., pp. 238, 276, 280, 290-92, 356), noting at one point "if the evidence is what you already told us about, then that's a good and sufficient answer." (C.D., p. 290).

For defense counsel to pick out the few instances where, after repeated questioning about the same issues, Chambers

replied "no" to his questions about evidence or facts, while ignoring the testimony that Chambers had repeatedly given on the same issues, is at best a gross mischaracterization of Chambers' testimony, and at worst, a possible attempt to mislead the Court.

10. As to Defendant's section number 15, Chambers based her claim on what the individual males involved had told her regarding their salaries (C.D., pp. 159, 160, 162); she could not obtain such information from "official" sources due to confidentiality, and ATA had already misled her informally in McEnroe's November 24, 1988 letter. (See p. 5, Resp. to M. to Strike Aff.)

Furthermore, Chambers' pay request in her letter of June 29, 1987 was that she wished to receive "$500.00 per year more than the currently highest (and newest)

Crew Planner." (Defendant's deposition Exhibit 18). Chambers initially testified that the reference to "highest and newest" was to John Petrison (C.D., p. 226), but then changed her mind, believing that person to be Larry McClure (C.D., p. 227). However, she had earlier testified that Petrison had been transferred in to help McClure, obviously making Petrison junior to McClure (C.D., p. 163). Laura Knowles' testimony in her deposition also shows that Petrison was junior to McClure (L.K. deposition, p. 40), and that Petrison was in fact the newest planner and the person to whom Chambers was referring in her letter (L.K. deposition, p. 83). Dan Copp's affidavit establishes that John Petrison was making more money than Becky Chambers in June of 1987 (Copp aff., p. 2). The obvious inference from this is that, at the time of her resignation, Chambers

believed correctly that she was being paid less than the newest and highest paid planner, who was in fact Petrison, and that by November of 1988, she had simply forgotten or become confused as to the precise identity of the individual occupying that position.

11. Regarding Defendant's section number 16, I will reiterate that Chambers had repeatedly testified to the facts and evidence that she had regarding pay and promotions, as demonstrated by section 9, so that defense counsel' statement that "Chambers testified none of the alleged acts by American Trans Air that led to her resignation had anything to do with her sex and she had no facts to support such a belief" ("Facts", p. 6), is inaccurate.

Chambers became somewhat exasperated with defense counsel's questioning about her evidence regarding some of her

problems; l"No. And a person would never have facts to your line of questioning. It just doesn't make sense." (C.D., p. 226); "no. It's not likely the company's going to come up and say, Hey, here's facts that we're discriminating against you." (C.D., p. 232), demonstrating that she understands, as should defense counsel, the difficulties in obtaining direct evidence in discrimination cases.

12. Regarding Defendant's section 17, the fact that Chambers' supervisors Knowles and Neher were females does not mean that they could not discriminate against her. In re Lewis, 845 Fed. 2d 624, reh. den. (6th Cir. 1988) (black supervisor's involvement in decision to discharge black employee did not preclude finding of race discrimination); Joyner vs. AAA Cooper Transportation, 597 F.Supp. 537, aff'd 749 Fed. 2d 732 (11th Cir. 1984) (supervisor

and employee of same sex). Nor does the fact that some females were promoted or received pay increases mean that others were not discriminated against because of their sex. Volk vs. Coler, 845 Fed. 2d 1422 (7th Cir. 1988); Pitre vs. Western Electric Co., 843 Fed. 2d 1262 (10th Cir. 1988).

The fact that Chambers never applied for a promotion is irrelevant because there is no evidence that these jobs were ever posted, or that applying was necessary. Box v. A & P Tea Co., 772 F.2d 1372, 1376-77 (7th Cir. 1985) (Where employer does not post openings or ask for applications, but employees are sought out by management, Plaintiff is not required to show that she applied for and sought promotion.) Hartman vs. Wick, 600 F.Supp. 362 (D.D.C. 1984). (Where employee had pre-selected male who was promoted, so that application by female

was futile, application was not required). Further, an important element of the "promotion" aspect of the case is the propensity of Defendant to quietly add duties for females, while circumventing status or pay given to men for comparable work.

Chambers had involved personnel regarding the discriminatory treatment by Bobi Neher on at least one occasion (C.D., p. 96), so Defendant's subpart (i) is false.

When Chambers resigned, she did point out in her letter some of the discriminatory conditions that existed: unequal pay, unbalanced workload, failure to correct the unbalanced workload or provide adequate assistance (Defendant's deposition Exhibit 18). The fact that she did not label this "sex discrimination" is irrelevant.

13. Regarding Defendant's Section 18, defense counsel again misrepresents Chambers' testimony when he says "she filed charges with no other state agency." ("Facts", p. 7). Chambers testified in deposition that she did not know whether or not a separate charge had been filed on her behalf with the Indiana Civil Rights Commission, the state agency charged with investigating complaints of discrimination (C.D., pp. 295-96).

Had defense counsel conducted even the most cursory of investigations, he would have discovered that the Equal Employment Opportunity Commission (EEOC) and the Indiana Civil Rights Commission (ICRC) have a worksharing agreement, such that when a complainant files a charge with one agency. that charge is automatically filed with the other agency, which was precisely what occurred in this case (certified copy of

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Charge Transmittal to ICRC).

As Defendant correctly noted, the timely filing of a charge with the EEOC (within 180 days) is required, unless the complainant has initiated proceedings with a state or local agency charged with such investigation, in which case the period is 300 days after the alleged unlawful act. United Airlines vs. Evans, 431 U.S. 553 (1977).

When the EEOC refers a charge initially filed with it to the ICRC under a worksharing agreement, that is regarded as "initially institut▌ing▌ proceedings" under proceedings" under section 706 subpart (e) of Title VII (42 U.S.C. §200 e-5(e)), according to the Supreme Court in Love vs. Pullman Co., 404 U.S. 522, 522-26, 92 Sup. Ct. 616, 618-19, 30 L.Ed 2d 679 (1972).

The Supreme Court expressly held that

a timely (i.e., within 180 days) filing with the state agency is not necessary to give a complainant the extended 300 days time period within which to file with the EEOC. EEOC vs. Commercial Products Co., U.S. __, 108 Sup. Ct. 1666, 1675, 100 L.Ed 2d 111, 56 U.S. L.W. 4429 (1988). In so doing, the Supreme Court adopted the view advanced by the 7th Circuit, and all other circuits to consider this question. Gilardi vs. Schroeder, 833 F.2d 1226 (7th Cir. 1987); Mennor vs. Fort Hood National Bank, 829 F.2d 553, 556 (5th Cir. 1987); Thomas vs. Florida Power & Light, 764 F.2d 768, 771 (11th Cir. 1985); Howze vs. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1211 (3d Cir. 1984); Smith vs. Oral Roberts Evangelistic Ass'n, 731 F.2d 684, 687-90 (10th Cir. 1984); Jones vs. Airco Carbide, 691 F.2d 1111200, 1201-04 (6th Cir. 1982).

Chambers was constructively discharged

July 8, 1987, when her requests of Defendant to remedy the discriminatory conditions were refused and her resignation was accepted. (C.D. p. 245). Chambers testified that she did not want to resign (C.D. p. 209) but wanted for the Defendant to stop its discriminatory treatment of her, as outlined in section 9.

Chambers testified that she believed that all of the male crew planners were being paid more than she (C.D. pp. 159-62). I asked her supervisor, Laura Knowles, if that impression was incorrect, why did Ms. Knowles not simply tell Chambers that she was mistaken. (L.K. Dep. pp. 79-83). Ms. Knowles refused to explain why she did not provide this simple explanation which likely would have averted Chambers' resignation, but said merely "because I didn't talk to [redacted] about it at all." (L.K. Dep., pp. 79-83).

Chambers believed that Knowles deliberately refused to even the workload between the male and female planners, or to get adequate help because she wanted Chambers to quit. (C.D. p. 213).

When an employer deliberately creates working conditions that are so difficult or unpleasant that a reasonable person would leave, that is a constructive discharge. Martin v. Citibank, 762 F.2d 212 (2d Cir. 1985).

A constructive discharge can be the basis for a sex discrimination charge if the intolerable working conditions were imposed on a plaintiff because of her race or sex. Brown v. Eckard Drugs, 663 F.2d 1268 (4th Cir. 1981) reh den 669 F.2d 913.

"The issue of constructive discharge depends on the facts of each case..." Henry v. Lennox Industries, 768 F.2d 746, 751 (6th Cir. 1985). The Henry Court found

that a constructive discharge had occurred where a less qualified male was promoted into a position for which the plaintiff was qualified, and which she had in fact been doing. She was demoted to her former position, was never seriously considered for the promotion, and was required to train the man who had received it. Id.

Chambers endured some of the same inequities, and was the subject of constant harassment by her supervisor as well, as outlined in section 9.

There is substantial evidence that Chambers was constructively discharged, which should not be resolved by summary judgment, and her charge to the EEOC was made within 300 days of her termination.

It is clear then, from the facts and the law, that Chambers' charge was timely filed with the EEOC.

Furthermore, unequal pay and

discrimination in promotions are "continuing" violations. Hall v. Ledex, 669 F.2d 397, 398 (6th Cir. 1982) ("Hall suffered a denial of equal pay with each check she received."); Moore v. Sunbeam Corp., 459 F.2d 811, 828 (7th Cir. 1972) (failure to promote may be continuing violation). "An allegation that unfair bias permeates the personnel practices of an enterprise involves the doctrine as well." Shehadeh v. Chesapeake & Potomac Tel. Co., 595 F.2d 711, 724 n. 70 (D.C. Cir. 1978), citing Laffey v. Northwest Airlines, 567 F.2d 429 (D.C. Cir. 1976) cert. den. 434 U.S. 1086, 98 S.Ct. 1281, 55 L.Ed. 2d 792 (1978).

Chambers alleges in her charge to the EEOC, that she and other women were paid less than men who had comparable responsibility. A discriminatory failure to promote women is one vehicle by which

such unequality in pay is realized. Chambers is not required to allege in her charge to the EEOC, in so many words, that she was discriminatorily denied a promotion, in order to so allege in her complaint. Rather, her complaint may encompass allegations actually made, as well as those which could grow, or could reasonably be expected to grow, out of the allegations of the charge. Jenkins v. Blue Cross Mutual Hospital Insurance, 538 F.2d 164 (7th Cir. 1976) cert. den., 429 U.S. 986, 97 S.Ct. 506, 50 L. Ed 2d 498. (Black female alleged that she had been fired because of her Afro hair-style, and mentioned,almost in passing, to her position as a leader of the women. The court found these utterances sufficient to sustain allegations of race and sex discrimination in her complaint.) A charge of sex-segregation in jobs "necessarily

encompasses discrimination in recruiting, hiring, transfer and promotion policies, and is reasonably related to an allegation of unequal pay." Babrocky vs. Jewel Food Co., 773 F.2d 857, 866 (7th Cir. 1985).

Therefore, Chambers' claims of discrimination in promotions is encompassed by a timely charge filed with the EEOC.

14. I believe that the facts submitted in this affidavit should be sufficient by themselves to show summary judgment should be denied; however, there are facts which I do not yet have access to, or have been unable to present to the Court, which would bolster the evidentiary facts presented so far, and which justify holding the summary judgment motion in abeyance until the completion of discovery, as authorized by FRCP 56(f).

(a) I need to interview or depose co-workers and superiors of Becky Chambers,

including George Mickelsons, Jerry Taylor, Jim Hlvacek, Bobi Neher, John Piburn, James Geuea, Roberta Sanders, Dione Atkinson and others mentioned in Chambers' deposition, regarding the discriminatory actions of defendant, as outlined in section 9.

Information relating to the specific decision-making process regarding the instances of discrimination which Chambers suffered is exclusively within the possession of the Defendant. Plaintiff should be allowed to try to ferret out direct evidence of the discriminatory decision making, or to gather additional circumstantial evidence to make her case indirectly. LaMoutagne v. American Convenience Products, 750 F.2d 1405, 1410 (7th Cir. 1984), ("Even an employer who knowingly discriminates on the basis of age may leave no written records revealing the forbidden motive and may communicate it

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orally to no one. When evidence is in existence, it is likely to be under the control of the employer, and the plaintiff may not succeed in turning it up. The indirect method compensates for these evidentiary difficulties...")

(b) Because statistical information is so important to proving a Title VII sex discrimination case, the vital aspect of Plaintiff's proof cannot be obtained until Defendant has responded to Plaintiff's interrogatories served March 1, 1989, which should provide the raw data form which such statistical evidence can be derived.

(c) Depositions of Laura Knowles' roommates or others who are familiar with her romantic activities with American Trans Air personnel.

Ordinarily, a person' intimate relationships are no business of others. However, in Title VII sex discrimination

cases, if some women are treated more favorably on the job due to romantic liaisons with men, this creates an oppressive situation for all women employees, who must then make a choice, which male employees are not forced to make. King vs. Palmer, 778 F.2d 878 (D.C. Cir. 1985); accord Priest vs. Rotary, 634 F.Supp. 571 (N.D. Cal. 1986).

Chambers testified in her deposition that Laura Knowles was "loose" in the sexual sense of the word. (C.D., p. 182).

Laura Knowles testified in her deposition that she opted for male roommates, who were not her boyfriends, at various times when she lived in St. Louis and Indianapolis. (L.K. Dep., pp. 9, 107).

Laura Knowles testified in her deposition that her immediate supervisor, John Piburn, considered himself a ladies' man, that he "came on" to females

employees, and that he was always touching female employees and trying to get them to go to dinner with him, even though he was married (I.K. Dep., pp. 125-26).

Current and former employees have given Plaintiff's counsel information regarding Knowles' romantic activities with American Trans Air personnel, which may have affected how Laura was treated relative to other women.

(d) While Plaintiff is not required to divulge confidential information or work-product to defeat a summary judgment motion or to obtain the remedies of FRCP 56(f), I would be willing to make available for the Court's in camera inspection, my notes of interviews with current and former employees of Defendant, who are unwilling to divulge their identities to Defendant to date. I do not offer these hearsay statements for the facts contained in them,

but to show the Court that there are significant lines of inquiry which Plaintiff's counsel should be allowed to pursue through additional discovery.

The interviews have revealed:

-- confirmation that John Piburn, who supervised both Laura Knowles and Becky Chambers, was always touching women, and that the "restroom talk: was that a woman had to become romantically involved with Piburn to get anywhere.

-- that Laura Knowles liked the men and made an effort with them, while indicating to women that dealing with them was "a hassle" (Synopsis of statements of several witnesses)

-- that Laura Knowles was "flirty", "slept around" and that the (male) crews liked her.

-- that Laura Knowles told the

employees that she supervised that Chambers had been "terminated"

-- that Laura Knowles' predecessor, Bob Gray, who was paid double the amount Knowles was paid, was terminated for sexual harassment.

-- confirmation that Chambers was harassed by Knowles.

-- confirmation that the workload was grossly imbalanced between male and female crew planners.

-- numerous examples of women who were replaced by men who were paid as much as twice the amount women were paid; women had comparable responsibilities, but were given clerical titles and correspondingly lower pay than men with the same responsibilities; women who were replaced or demoted while on maternity leave, on vacation or out

of town on business, for infractions for which men received verbal or written warnings.

-- that only men were given large raises by George Mikelsons, who would call them in personally to grant them.

-- that men hired later than women for identical positions, and with no experience, were paid more than the women.

-- that men are given more favorable hours so they could attend school or work overtime, which women in the same area were not allowed to do.

-- that many job openings within the company were not posted, and that the company's policy was to not post upper level openings, none of the top 26 of which were occupied by women the first 14 years of the company's

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existence.

-- captains and cockpit crew (male) were given single rooms on layovers, while flight attendants (female) had to share rooms.

-- A male supervisor locked the door of the women's restroom so that his female employees had to request the key from him.

-- even in clerical departments, which are almost exclusively female, the supervisors are generally male.

15. Under Federal Rule of Civil Procedure 56(f), a party opposing a summary judgment motion is not required to present proof itself, but an affidavit supporting the existence of the proof. Wright-Miller-Kane, Federal Practice and Procedure; Civil 2d §2740 (1983). I have, per the rule, set out these evidentiary facts, and a partial list of the necessary discovery yet to be

completed, which I believe will show the Court that this is not a mere "fishing expedition", and that Plaintiff can successfully oppose Defendant's Motion for Summary Judgment if allowed to proceed with discovery.

And further, Your Affiant Sayeth Naught.

/s/ Gordon Dempsey

Gordon Dempsey

VERIFICATION

I hereby affirm, under penalties of perjury, that the foregoing representations are true based upon personal knowledge.

/ s /

Gordon Dempsey

Gordon Dempsey

NOTARIZATION

STATE OF INDIANA)
)SS:
COUNTY OF MARION)

Subscribed and sworn to before me a

Notary Public in and for the County of Marion, State of Indiana, this 10th day of March, 1989.

MY COMMISSION EXPIRES:

/ s /

Donna L. Fox
6-3-91

Notary Public
(SEAL) Resident of Marion County

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BECKY CHAMBERS,	)
	)
Plaintiff,	)
	)
vs.	)
CAUSE NO. IP88-1203C	
	)
AMERICAN TRANS AIR, INC.,	)
	)
Defendant.	)

MOTION FOR ENLARGEMENT OF TIME WITHIN WHICH TO RESPOND TO SUMMARY JUDGMENT

Comes now Plaintiff, by counsel, and for her Motion says:

1. The Motion for Summary Judgment was filed January 12, 1989, after no written discovery and no depositions by Defendant to determine what evidence Plaintiff has, other than one deposition of Becky Chambers only.

2. It is not reasonable to expect a Plaintiff's case to be based entirely on

facts known to her.[1]

3. Summary judgment motions are normally appropriate for filing or consideration, at the close of discovery, not at the beginning. Patterson vs. GMC, 631 F.2d 476, 482 (7th Cir. 1982), Cert. denied 451 U.S. 914.

4. The inference is a fairly strong one that Defendant is attempting to use summary judgment as a substitute for discovery, other than as to A of its memorandum, relating to the applicable filing date.

5. At the February 1, 1989 hearing, Plaintiff's counsel had with him drafts of proposed discovery relating to the class action and the claim of Becky Chambers.

6. At the February 1 hearing, the Court stayed discovery relating to the

[1]See Occidental vs. Bartley, 434 F.2d 55 (10th Cir. 1970).

class allegations, and Plaintiff has since removed from its written discovery any items applicable only to the class action, and has served said discovery on the 1st day of March, 1989.

7. The responses to the written discovery will more likely than not lead to information relevant to summary judgment, including at least:

a. Statistical patterns into which Becky Chambers fell, not only within her own section, but in related sections or sections involving comparable tasks.

b. Information which may show a chain between the blatant animus at the top of the Company, and the events in the section of Becky Chambers and affecting her in particular.

c. Specific similar occurrences.

d. Details of relationships between persons controlling directly or

indirectly events affecting Becky Chambers or her section.

8. Plaintiff stresses that Plaintiff now possesses substantial evidence which in Plaintiff's view should rebut the inferences and arguments in the Motion of Defendants for Summary Judgment with respect to Becky Chambers in particular, but the point Plaintiff advances is that it is not reasonable to compel Plaintiff to resist summary judgment based on such information as Plaintiff has at this juncture.

9. It is correct that the arguments advanced under Section A of the memorandum of Defendant in support of summary judgment, relating to timeliness, do not require further discovery,and may be appropriate for prompt resolution, although Plaintiff has not at this writing bifurcated its treatment by filing a response as to p. A only.

WHEREFORE, Plaintiff moves the Court to enlarge the time within which briefs and supporting materials in opposition to summary judgment must be filed, to a date beyond completion of discovery as to the case of Becky Chambers individually, with a shorter enlargement of approximately 30 days, with respect to the timeliness issue, and for all other reasonable relief.

/ s /

Gordon Dempsey

GORDON DEMPSEY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by ordinary U.S. Mail, postage prepaid on Gregory J. Utken and David Miller, BAKER & DANIELS, 810 Fletcher Trust Building, Indianapolis, Indiana 46204, on this 1st day of March, 1989.

/s/

GORDON DEMPSEY

Gordon Dempsey
SUTHERLIN & DEMPSEY
2855 One American Square
Box 82050
Indianapolis, IN 46282
(317) 634-6577

APPENDIX E

March 1, 1989 Motion for Enlargement

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BECKY CHAMBERS,	)
	)
Plaintiff,	)
	)
vs.	)
CAUSE NO. IP88-1203C	
	)
AMERICAN TRANS AIR, INC.,	)
	)
Defendant.	)

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/ s /

Gordon Dempsey

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/s/

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